

INDEX.

| | |
|--|----|
| Questions eliminated—Introduction | 3 |
| Cases cited: | |
| <i>German Alliance Insurance Company vs. Kansas</i> , 233 U. S. 389..... | 5 |
| <i>Rast vs. Van Deman & Lewis Company</i> , 240 U. S. 342, and associated cases..... | 5 |
| The act deals only with the normal contracts of commerce | 6 |
| Purview of the act | 7 |
| Equal protection of the laws | 8 |
| Arbitrary power | 9 |
| Cases cited: | |
| <i>Harmon vs. State</i> , 66 O. S. 249..... | 10 |
| <i>City of Richmond vs. Dudley</i> , 129 Ind. 112 | 11 |
| <i>Bills vs. The City of Goshen</i> , 117 Ind. 221.... | 11 |
| <i>Mayor vs. Radecke</i> , 49 Md. 217..... | 11 |
| <i>State vs. Tenant</i> , 110 North Carolina 609..... | 11 |
| <i>State ex rel. Gambad vs. Deering</i> , 84 Wis. 585. | 11 |
| <i>Cicero Lumber Company vs. Town of Cicero</i> , 176 Ill. 9 | 11 |
| <i>Noel vs. The People</i> , 187 Ill. 587..... | 11 |
| <i>Yick Wo vs. Hopkins</i> , 118 U. S. 356..... | 11 |

Index.

| | |
|---|----|
| Butchers' Union vs. Crescent City Co., 111 U. S. 746 | 11 |
| Allguyer vs. Louisiana, 165 U. S. 578..... | 11 |
| People ex rel. Moskowitz vs. Fred Jenkins, 202 N. Y. 53 | 13 |
| Police power | 14 |
| Cases cited: | |
| Atchison, Topeka & Santa Fe Ry. Co. vs. Vosburg, 238 U. S. 56..... | 17 |
| Due process of law | 17 |
| Cases cited: | |
| Smith vs. Burlingame, 4 Mason, 121..... | 17 |
| Discrimination against patents, etc..... | 18 |
| Cases cited: | |
| Allen vs. Riley, 203 U. S. 347..... | 19 |
| Ozan Lumber Company vs. Union County National Bank of Liberty, 207 U. S. 251.... | 19 |
| Other discriminations violative of the Fourteenth Amendment | 20 |
| The rational rule | 26 |
| Pertinent citations preliminary to the discussion of the commerce clause of the constitution..... | 27 |
| Cases cited: | |
| Hannibal & St. Joseph Railroad Co. vs. John F. Husen, 95 U. S. 465..... | 27 |
| Welton vs. Missouri, 91 U. S. 275..... | 27 |
| The Blue Sky Law of Ohio contravenes the commerce clause of the federal constitution..... | 28 |
| Cases cited: | |
| Nathan vs. Louisiana, 8 How. 73..... | 28 |
| Paul vs. Virginia, 8 Wall. 168..... | 28 |

Index.

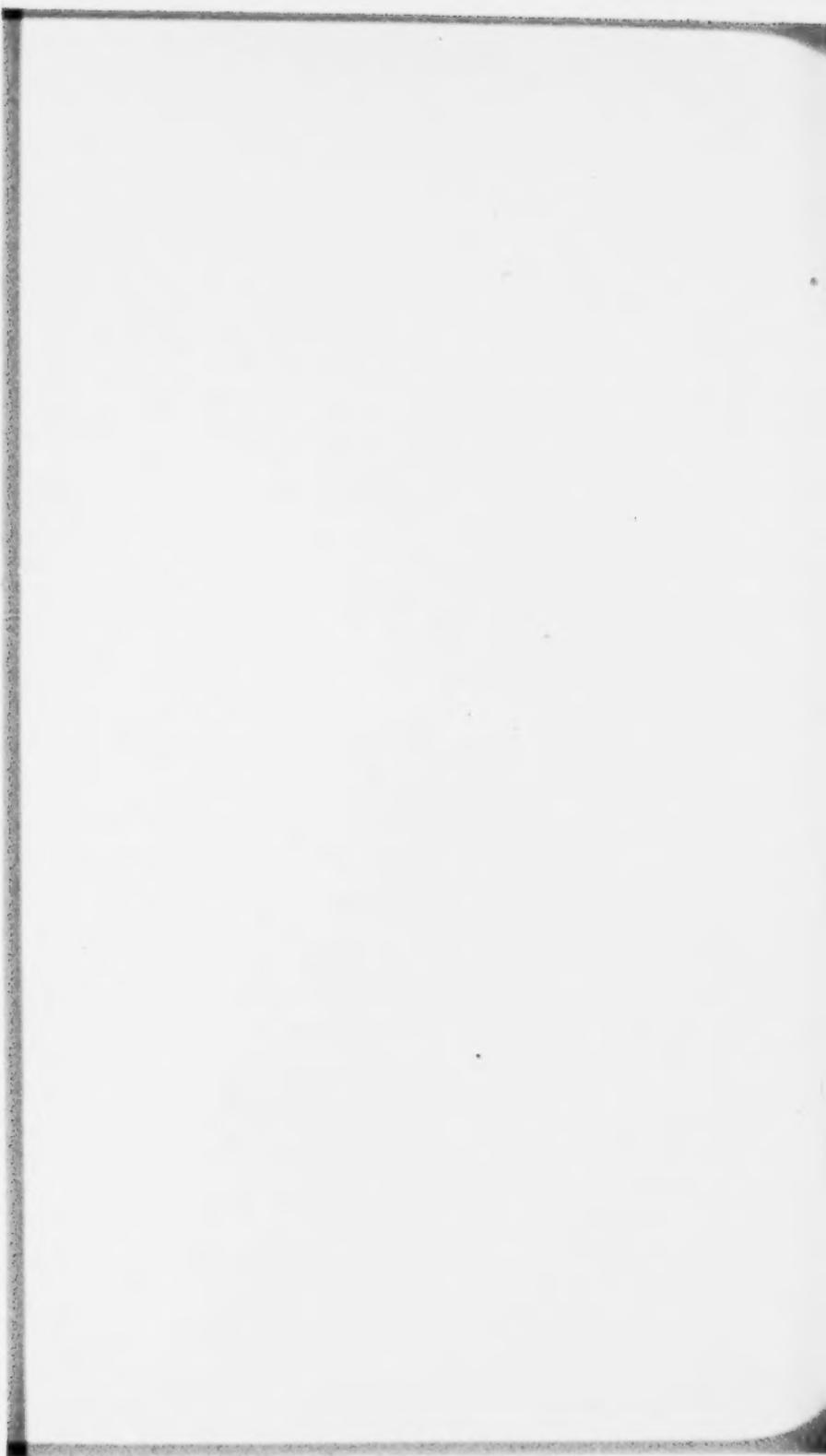
| | |
|--|-----|
| International Text Book Company vs. Pigg, | |
| 217 U. S. 91..... | 28 |
| Buck Stove & Range Company vs. Vickers, | 226 |
| U. S. 205, 213-216 | 28 |
| Lottery cases, 188 U. S. 321..... | 28 |
| Alabama & N. O. Transportation Co. vs. Doyle, | |
| 210 Fed. Rep. 173..... | 28 |
| Butler Bros. Shoe Company vs. U. S. Rubber Co., | 156 |
| Fed. Rep. 1..... | 29 |
| Opinion of Judge Sanborn..... | 29 |
| Transportation not the only element in commerce... | 30 |
| Cases cited: | |
| Leloup vs. Mobile, 127 U. S. 640, 648..... | 31 |
| Bowman vs. Chicago, N. & W. Ry. Company, | |
| 125 U. S. 465 | 31 |
| Leisy vs. Hardin, 135 U. S. 128..... | 31 |
| Discussion of the case of Nathan vs. Louisiana..... | 32 |
| Paul vs. Virginia briefly discussed..... | 33 |
| Cases cited: | |
| New York Life Insurance Co., Deer Lodge | |
| County, 231 U. S. 495..... | 34 |
| Mobile County vs. Kimball, 102 U. S. 691..... | 34 |
| Does the case at bar come within the principles of the | |
| cases of Nathan vs. Louisiana and Paul vs. Vir- | |
| ginia, or does it come within the principles of the | |
| Lottery cases and the case of International Text | |
| Book Company vs. Pigg and Buck Stove & Range | |
| Company vs. Vickers? | 35 |
| Cases cited: | |
| Story on the Constitution, 1072..... | 37 |
| The holding in the case of Buck Stove & Range Co. vs. | |
| Vickers, 229 U. S. 205, followed by the District | |
| Court | 40 |

Index.

| | |
|--|----|
| Quotation from opinion of Mr. Justice Van Devanter | 40 |
| Quotation from opinion of Judge Sater..... | 42 |
| The power of Congress over interstate commerce—when exclusive | 42 |
| Cases cited: | |
| Crandall vs. Nevada, 6 Wall. 42..... | 43 |
| Steamship vs. Portwardens, 6 Wall. 31..... | 43 |
| Ex Parte vs. McNeil, 13 Wall. 236..... | 43 |
| Sabine Robbins vs. Taxing District of Shelby county, Tennessee, 120 U. S. 489..... | 43 |
| Philadelphia Southern Mail Steamship Company vs. Commonwealth of Pennsylvania, 122 U. S. 326 | 43 |
| Haskell vs. Cowham, 109 C. C. A. 235..... | 44 |
| Henderson vs. Mayor of New York, 92 U. S. 259 | 44 |
| Railroad Company vs. Husen, 95 U. S. 465.... | 44 |
| Bowman vs. Chicago, N. & W. Ry. Co., 125 U. S. 465 | 44 |
| Mugler vs. Kansas, 123 U. S. 625..... | 44 |
| Pullman Company vs. Kansas, 216 U. S. 56... | 44 |
| Darnell vs. Memphis, 208 U. S. 113..... | 44 |
| Minnesota vs. Barber, 136 U. S. 313..... | 44 |
| Brehmer vs. Redman, 138 U. S. 78..... | 44 |
| Voight vs. Wright, 141 U. S. 62..... | 44 |
| Welton vs. Missouri, 91 U. S. 275..... | 45 |
| Brown vs. Houston, 116 U. S. 446..... | 45 |
| Freight Tax, 15 Wall. 232..... | 45 |
| Quotation from Chief Justice Marshall in Brown vs. Maryland | 46 |

Index.

| | |
|--|----|
| The Ohio act most obnoxious and most burdensome to interstate commerce | 48 |
| Quotation from Judge Sater's opinion..... | 49 |
| The state not within the legitimate exercise of its police powers in enacting the Blue Sky Law..... | 49 |
| Cases cited: | |
| Butler Bros. Shoe Company vs. U. S. Rubber Company, 156 Federal Rep. 17..... | 50 |
| Adams Express Company vs. New York, 232 U. S. 14 | 51 |
| Crutcher vs. Kentucky, 141 U. S. 47..... | 51 |
| Gibbons vs. Ogden, 9 Wheaton, 1..... | 51 |
| Pensacola Telegraph Company vs. Western Union Telegraph Company, 96 U. S. 8..... | 51 |
| Haskell vs. Cowham, 109 U. S. C. C. A. 235... . | 51 |
| Kansas City Southern Railway Co. vs. Kaw Valley Drainage District, 233 U. S. 75..... | 53 |
| The state may not impose a license charge on one who sells articles which he imports..... | 54 |
| Judson on Interstate Commerce. Section 21.. | 54 |
| Corporations are persons within the meaning of the Fourteenth Amendment, and are therefore entitled to due process of law and the equal protection of the laws | 54 |
| Judson on Interstate Commerce. Section 16... . | 54 |
| The amendment of the Ohio constitution is without effect in this case | 55 |
| Cases cited: | |
| Dartmouth College vs. Woodward, 4 Wheaton, 518 | 55 |
| Chicago, Burlington & Quincy Railroad Co. vs. Railroad Commission of Wisconsin, 237 U. S. 220-234 | 55 |
| As to appellees, Rose and Coultrap | 56 |
| Conclusion | 56 |



IN THE

Supreme Court of the United States

October Term 1915.

No. 438.

HARRY T. HALL, SUPERINTENDENT OF BANKS
AND BANKING OF THE STATE OF OHIO,
Appellant,

vs.

THE GEIGER-JONES COMPANY,

No. 439.

HARRY T. HALL, SUPERINTENDENT OF BANKS
AND BANKING OF THE STATE OF OHIO,
Appellant,

vs.

DON C. COULTRAP.

No. 440.

HARRY T. HALL, SUPERINTENDENT OF BANKS
AND BANKING OF THE STATE OF OHIO;
CYRUS LOCHER, PROSECUTING ATTORNEY
OF CUYAHOGA COUNTY, OHIO, AND WILLIAM
T. SMITH, SHERIFF OF CUYAHOGA COUNTY,
OHIO,

Appellants,

vs.

WILLIAM R. ROSE AND THE RICHARD AUTO
MANUFACTURING COMPANY.

BRIEF FOR APPELLEES.

INTRODUCTION.

Two considerable portions of the brief of counsel for appellant relate to questions which are not involved in this case. In the cases of Coultrap and The Geiger-Jones Company a license had been issued by the commissioner, and it was alleged that the attorney general was about to advise him to revoke it and that he was about to follow the advice, and an injunction against that proceeding was prayed for. The bill also alleged generally the threats to enforce this law against those plaintiffs and the grounds for its unconstitutionality were alleged and there was a prayer for an injunction against such enforcement and for general relief. There was no temporary injunction allowed to restrain the attorney general from advising the cancellation of the license. This license which had been issued expired on the last day of December, 1915, before the entry of the decree from which this appeal was taken and before the decision of the case by the court. Therefore, the question of the proceedings to revoke the license has disappeared from the case. And, as no restraining order was issued against the attorney general at any time, there is no question before this court on appeal as to the propriety of such a restraining order.

In the other cases there was in connection with the general allegations of the threat to enforce this statute and the allegations of the grounds of its invalidity, the further allegation that Rose had been indicted for offering securities of the RiChard Company for sale, that he had been tried, a verdict of guilty returned and a

motion for a new trial filed. There was a prayer to enjoin the further prosecution of that suit and for an injunction against the enforcement of the act as against either Rose or the RiChard Company and a prayer for general relief. The restraining order granted by the district judge expressly provided that it should not operate to enjoin the further prosecution of the indictment against Rose. The same condition was embraced in the interlocutory injunction allowed in the decree from which this appeal is taken, and, therefore, the question of the right to enjoin that proceeding is not in the case.

We may make further progress by eliminating from the brief of counsel for appellant groups of cases which seem to have no relation whatever to the present case. Types of them are, The German Alliance Insurance Company vs. Kansas, 233 U. S. 389, where after a careful analysis of the subject the court itself fixed the boundaries of the precedent which it was establishing, when at page 414 it said:

“We have shown that the business of insurance has very definite characteristics with a reach of influence and consequence beyond and different from that of the ordinary business of the commercial world, to pursue which a greater liberty may be asserted. The transactions of the latter are independent and individual, terminating in their effect with the instances. The contracts of insurance may be said to be interdependent.”

Also besides the considerations here involved are the cases of Rast vs. Van Deman & Lewis Company, 240 U. S. 342, and the group of cases considered and reported with it. These cases involved a consideration of the legal character and status of sales with coupon or trad-

ing stamp devices. After a careful analysis of all those devices and the distinctions between them and the normal contracts of commerce they were held to be subject to restraining legislation by the state, because "they tempt by a promise of value greater than that article and apparently not represented in its price, and it hence may be thought that thus by an appeal to cupidity lure to improvidence,"—a conclusion which would probably meet the prompt assent of every lawyer who has ever purchased a handful of cigars at a stand of the United Cigar Company, and has reflected upon the character of the transaction.

THE CONTRACTS RESTRICTED BY THIS ENACTMENT ARE THE NORMAL CONTRACTS OF COMMERCE.

The enforcement of the act against the original complainants was enjoined in the court below because it is violative of the constitutional provisions relating to due process of law, the equal protection of law, the preservation of liberty and the immunity of interstate commerce from state interference.

Neither among the judges who sat in the court below nor among counsel engaged in the case does there appear to be a confident opinion respecting the interpretation of some of the provisions of the act. Its title is misleading, its purview and general form are unusual and much of its subject matter lies within the domain of judicial proceedings for the appointment of guardians of the estates of adult persons who are adjudged to be non-comptes.

It is entitled "An Act to regulate the sale of bonds, and other securities, and of real estate not located in Ohio, and to prevent fraud in such sales." This attractive title may have been very helpful in securing the legislative votes required to pass the act, but it pays small regard to its provisions. The most attractive title of which the provisions of the act would admit would be: An Act to condition and prohibit commerce lest in its conduct sellers might in some instances practice fraud and in others purchasers might sustain financial loss from the exercise of defective judgment.

The purview of the act is contained in Section 1. It clearly gives to the act a scope which will not admit of its vices being minimized as is attempted by our adversaries. "Except as otherwise provided in this act, no dealer shall—dispose or offer to dispose of any stocks, bonds, mortgages or other instruments evidencing title to or interest in property or other securities of any kind or character, etc.", clearly requires us to look to the exceptions of the act, not for the transactions which are prohibited or conditioned, but for those which are free. Our analysis of the act is mainly identical with, and in all respects consistent with, that given in the opinion of the court below. Provisions, which in our view, render the act clearly void, are found:

1st. In the arbitrary power conferred upon the commissioner to grant or refuse licenses to anyone seeking that indispensable authority to carry on an ordinary calling and to exercise his guaranteed right of contract.

2nd. In provisions to authorize the commissioner to place forbidden restrictions and burdens on the conduct of his business by one who has obtained a license.

3rd. In provisions to confer upon the commissioner arbitrary power to revoke licenses.

Two vices in their influence pervade the entire act:

First, as a condition of obtaining a license every applicant is required to waive his right to the equal protection of the law.

It is provided in subsection "e" of Section 6373-3 that at the time of making application for a license the applicant "Shall also file with said commissioner a duly executed written instrument, irrevocable, consenting that any action brought against him arising out of and founded upon the fraudulent disposal of such securities by him or his agents may be brought in Franklin county, and that in the event that proper service of process cannot be had upon such applicant in such county, service of process made therein by the sheriff of such county by sending a copy thereof by registered mail at least thirty days prior to taking judgment in such case, addressed to such applicant at the place of his principal office named in his application, or such other place as the applicant may thereafter designate in writing filed with the commissioner, shall have the same effect as if personally made upon the applicant according to the laws of this state." Thus the applicant is required, as a condition to obtaining a license, to file an irrevocable waiver of his right to the equal protection of the laws. For, by the laws of this state, except upon a joint contract, a man cannot be sued except either in the county of his residence where summons may be served either personally or by leaving a copy thereof at his place of residence, or in a county to which he may have voluntarily gone where summons may be served personally.

This objection to the act was made by us in the court below where it was held to be a denial of the equal protection of the law. To all this counsel for the appellants have nothing to say except that the legislature of a state may provide by law where suits shall be brought. That can hardly be even offered as an answer to the objection that all the citizens of a state must be affected alike by such legislation, else they do not have the equal protection of the law required by the Fourteenth Amendment.

Second. The act attempts to confer upon the commissioner arbitrary power or authority to exercise legislative power.

By the act there has been no attempt to exercise legislative power in prescribing the qualifications of the person who may be entitled to receive a license to exercise dominion over his own property or to engage in interstate commerce. Both standards of qualification in a licensee and compliance with them are left to the exclusive and arbitrary will of the commissioner. Whether the act is condemned as a forbidden attempt to delegate legislative power, as has been done in some cases, or as an attempt to confer arbitrary power, as in others, it is in this respect violative of all the guarantees which we invoke.

The applicant for a license has no right to a hearing upon his application, nor has the holder of a license a right to be heard upon notice looking to its revocation.

It exacts from every applicant for a license a filing fee of \$5.00 and an annual license fee of \$50.00.

The applicant must also submit the names and addresses of its directors and officers, if a corporation, and of all partners, if it be a partnership, and of the indi-

vidual, if it be such. Also the names and addresses of all agents of such applicant assisting or about to assist in the disposition of securities; the location of its office without the state and within if it has both; the general plan and character of its business and reference as to its suitability for the transaction thereof, which representations the commissioner "Shall confirm by such investigation **as he may deem necessary**, establishing the good repute in business of such applicant, directors, officers and agents, the provision of the act being:

"If the 'commissioner' be satisfied of the good repute in business of such applicant, directors, officers, partners and agents, he shall, upon the payment of an annual fee of fifty dollars, and five dollars additional for each agent named in the application, register the applicant as a licensed dealer in such securities, and issue to him a license, containing the name of the applicant and all such agents, renewable annually upon the payment of such annual fee, unless revoked as herein provided. The expense of all publications provided for in this act shall be paid by the applicant for license."

In a less flagrant case legislation of this character has been judicially condemned in numerous cases. In *Harmon v. State*, 66 O. S. 249, an act was held to be void because in like terms it attempted to confer authority upon an administrative officer, called an "examiner," to determine arbitrarily who might receive licenses to pursue the calling of steam engineers. Since steam plants, managed by the unskillful or careless, are sources of danger to the public, the subject of that act was clearly within the police power, while, in our view, the subject of the present act is clearly excluded from it. The act was nevertheless held to be unconstitutional because of the

attempt to confer arbitrary power upon the examiner in these terms: "If upon examination the applicant is found trustworthy and competent, a license shall be granted him to have charge of, or to operate any steam plant."

The court said: "By this section the examiner is made exclusive judge as to whether the applicant is trustworthy and competent. No standard is furnished by the General Assembly as to qualification and no specifications as to wherein the applicant shall be trustworthy and competent, but all is left to the opinion, finding and caprice of the examiner. He is the autocrat with unlimited discretion, without rules prescribing the qualifications of applicants for licenses; etc."

It may be doubted whether such legislation has ever been sustained among a people supposed to be free. It has been vigorously and consistently condemned by the courts of this country in cases so numerous that their collection would be the appropriate work of a compiler of a digest. Among them are:

- City of Richmond vs. Dudley, 129 Ind. 112.
- Bills vs. The City of Goshen, 117 Ind. 221.
- Mayor vs. Radecke, 49 Maryland, 217.
- State vs. Tenant, 110 North Carolina, 609.
- State ex rel., Gambad vs. Deering, 84 Wis. 585.
- Cicero Lumber Co. vs. Town of Cicero, 176 Ill. 9.
- Noel vs. The People, 187 Ill. 587.
- Yick Wo vs. Hopkins, 118 U. S. 356.
- Butcher's Union v. Crescent City Co., 111 U. S., 746.
- Allguyer vs. La., 165 U. S., 578.

In the city of Richmond v. Dudley, 129 Indiana, 112, the court adjudged the invalidity of a city ordinance placing restrictions on the keeping and storing of in-

flammable and explosive oils, and on pages 114 and 115 it was said:

"It will be observed that this ordinance does not establish any general rules for the storage of the substances proposed to be regulated, and reserves to itself, at regular meetings the right to grant or refuse permission to keep and store such oils, dependent upon whether it at such time deems the location and buildings suitable for such purpose, and the person presenting the petition a "proper person." It further provides that the permission when granted, 'may be revoked at any time at the option of the council.'

Language better calculated to enable the common council to arbitrarily control the business without any fixed or known rules, cannot well be imagined. The business of keeping, storing and dealing in such oils is a legitimate business, and every citizen has an inherent right to engage in the business upon equal terms with any other citizen."

In Mayor vs. Radecke, 49 Md. 217, the court adjudged the invalidity of an ordinance regulating the use of steam engines. Recognizing that the subject was within the regulatory powers of the state and municipality, it adjudged the ordinance to be void, saying at page 230:

"It does not profess to prescribe **regulations** for their construction, location or use, nor require such precautions and safeguards to be provided by those who own and use them as are best calculated to render them less dangerous to life and property, nor does it restrain their use in box-factories and other similar establishments within certain definite limits, nor in any other way attempt to promote their safety and security without destroying their usefulness. But it commits to the unrestrained will of a single public officer the power to notify every person who now employs a steam engine in the transaction of any business in the city of Baltimore to cease to do so, and by providing compulsory fines for every day's

disobedience to such notice and order of removal, renders his power over the use of steam in that city practically absolute, so that he may prohibit its use altogether. But if he should not choose to do this, but only to act in particular cases, there is nothing in the ordinance to guide or control his action. It lays down no rules by which its impartial execution can be secured, **or partiality and oppression prevented.** It is clear that giving and enforcing these notices may, and quite likely will, bring ruin to the business of those against whom they are directed, while others over whom they are withheld may actually be benefited what is thus done to their neighbors, and when we remember that this action or non-action may proceed from enmity or prejudice, from partisan zeal or animosity, from favoritism and other improper influences and motives easy of concealment and difficult to be detected and exposed, it becomes unnecessary to suggest or comment upon the injustice capable of being wrought under cover of such a power, for that becomes apparent to every one who gives to the subject a moment of consideration. In fact, **an ordinance which clothes a single individual with such power hardly falls within the domain of law, and we are constrained to pronounce it inoperative and void.'**

In People ex rel. Moskowitz vs. Fred Jenkins, 202 New York, 53, the court held that Section 85 of the general municipal law, which prohibited the conducting of a transient retail business for the sale of goods which shall be represented or advertised as a bankrupt stock, or an assigned stock or as goods damaged by fire, water, or otherwise, etc., without first taking out a license, cannot be sustained as an exercise of either the police power or the power of taxation, and hence is unconstitutional, and the action of city authorities thereunder invalid. On page 56, Cullen, chief justice, said:

"The only branch of that power (the police power) under which it is contended that the present statute

can be upheld is for the prevention of fraud. If it is reasonably, though mistakenly, directed to that object, it is good. It seems to me, however, to have no such purpose. It is said that the representation that the goods in question are a bankrupt or a damaged stock induces customers to believe that they are of a high grade or quality and will be sold cheap and for much less than their original cost, while as a matter of fact they are of an inferior grade. That the representation may induce customers to believe that they can get a bargain may be assumed, but the representations enumerated in the statute have no relation to the quality and character of the goods, or, if any, certainly not to enhance or exaggerate such character. It can be readily seen how a statement that a stock of goods had not been damaged by fire, water or otherwise, might constitute a fraudulent representation as to their character or condition, but it is not easily perceived how a statement that they had been damaged could constitute such. But even though a statement that they had been damaged would be held an immaterial allegation in an action at law for fraud. I concede that no vendor has the right to tell a falsehood as to his goods, be it material or immaterial, and that the legislature may properly pass laws to prevent or punish false statements, but the legislation before us does nothing of the kind. If a man pays his license fee, he may sell the goods without penalty though his statement that they are damaged or bankrupt stock is entirely untrue. He may utter any falsehoods concerning his goods other than those mentioned in the statute and he may sell without a license fee. But a vendor may own goods which have been purchased at a sale of a bankrupt, or damaged by fire, and he has the unqualified right, to sell them and the unqualified right to tell the truth about them. He cannot under the exercise of the police power be prohibited from enjoying both those rights. "The right to buy, sell, barter and exchange property is a necessary incident to its ownership, and subject to reasonable regulations, is as much protected by this provision of the constitution as is the ownership itself."

In *State vs. Tenant*, 110 North Carolina, 609, the court held that an ordinance of the city of Asheville prohibiting the improvement or changing of a building without first obtaining permission from the board of aldermen was void. On page 612 it is said:

"Police power may be exercised by the sovereign state through the General Assembly in derogation of the absolute right of the individual only for the general benefit, and by means of statutory provisions that upon their face operate indiscriminately upon, and are enforceable by the same species of process against all persons and classes. *State v. Moore*, 104 N. C. 721; *State v. Chambers*, 93 N. C. 600; *State v. Stovall*, 103 N. C. 416; *Diset v. West Virginia*, 129 U. S. 114; *Mogler vs. Kansas*, 123 U. S. Rep₂ 623. 'Towns and cities cannot use their power to create monopolies for the benefit of private individuals, nor can they pass by-laws imposing penalties that do not operate equally upon all citizens of the state who may come or live within the corporate limits.' *State v. Pendergrass*, 106 N. C. 664; *State v. Summerfield*, 107 N. C. 898; 1 *Dillon*, Sec. 380 (313).

It is equally clear that if an ordinance is passed by a municipal corporation, which upon its face, restricts the right of dominion which the individual might otherwise exercise without question, not according to any general or uniform rule, but so as to make the absolute enjoyment of his own depend upon the arbitrary will of the governing authorities of the town or city, it is unconstitutional and void, because it fails to furnish a uniform rule of action and leaves the right of property subject to the despotic will of aldermen who may exercise it so as to give exclusive profits or privileges to particular persons. *Newton v. Belger*, 143 Mass. 598."

In *Bessom vs. City of Indianapolis*, 71 Indiana, page 189, the court adjudged the invalidity of an ordinance regulating hospitals. On page 198 it is said:

"It is sufficient to say, that, if the ordinance is valid, the common council and board of aldermen

have it in their power to grant one person a license, and refuse another under the same circumstances. No law could be valid which, by its terms, would authorize the passage of such an ordinance. The 23rd section of the Bill of Rights provides that 'The General Assembly shall not grant to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens.' What the legislature cannot do directly in this respect it can not authorize a municipal corporation to do."

In all of these cases and many others of like import the courts appear to have been guided by the conception so vigorously expressed by Mr. Justice Matthews in *Yick Wo vs. Hopkins*, 118 U. S. page 356:

"The very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another seems to be intolerable in any country where freedom prevails as being the essence of slavery itself."

If either of the objections just stated is well taken, the act under consideration is void in its entirety.

Other essential provisions of the act remove it from the legitimate scope of the police power. Since that power has not been—and perhaps may not be—brought within the precise boundaries of a conceptual definition, it is but natural that respecting its application questions may arise which evoke difference of opinion among intelligent and impartial men. The number of such questions is increased in the present case by the obscurities of the act. But we do not conceive that to maintain our present proposition we need enter into any field of doubt respecting either the meaning of the statute or the scope of the power.

It is now settled that the exercise of the police power must always be in subordination to the provisions of the Fourteenth Amendment. (Atchison Topeka & Sante Fe Ry. Co. v. Vesburg, 238 U. S., 56.)

While in the sanctioned exercise of that power it will frequently operate to place reasonable restrictions upon the right of contract, it may not be so exercised as to place unreasonable restrictions upon that right. In that respect this act offends seriously in its general scope. **Indeed, its proclaimed virtue is a vice.** That virtue is that while in form it conditions and under circumstances which are likely to arise, it prohibits sales and, it at the same time necessarily prevents purchases, and thereby shields contemplating purchasers from loss of property by the exercise of their own defective judgment. For, it is to be borne in mind that the terms of the act operate upon honest sales as well as those which are fraudulent. In all transactions within its purview it places the citizens of the state under guardianship and deprives them of dominion over their property which is an essential element of its ownership. Have we not known throughout our professional lives, and did not generations of lawyers before us know, that to deprive an adult persons of such dominion over his own property as will not injuriously, in a legal sense, affect others, requires process of law? So imbedded in the convictions of constitutional lawyers is this view that it is somewhat surprising to find that it was once challenged in court. That was in the case of Smith vs. Burlingame, 4 Mason, 121, where Mr. Justice Story vindicated the common conception of constitutional lawyers in an opinion which was as elaborate as the question required. His opinion was:

“The courts of Probate have no right to put a person under guardianship, as unfit to manage her af-

fairs, without notice to the party, and an adjudication of the facts, and until such adjudication no letters of guardianship can legally be issued. The case of Chase vs. Hathaway is directly in point and with that case I entirely concur."

In this respect it seems to be sufficient to say of the act that without process of law it reduces citizens to the status of persons who have been adjudged to be non compotes. Process of law requires that not only shall judicial power be exercised after a hearing to reduce an adult person to that status, but the same power and the discretion which it employs must be exercised in choosing a guardian or trustee of the particular property in question. Since this act operates upon all the persons and property within its purview, providing for a no more capable guardian or trustee than a petty administrative officer for the wide diversity of property within the scope of the act, it seems obvious that the good which it may accomplish must be secured at too high a price, the chief element of which would be the denial of the guaranteed rights of liberty and the control of property.

Though the legitimate exercise of the police power may sometimes impose reasonable restrictions upon the right of contract, **it can never be so exercised as to deny to any citizen the equal protection of the laws.** The offences of the act in this respect are so numerous that it will hardly be necessary to call attention even to all of those which result from the clear provisions of the act. Some of them are:

(a) The discriminating requirement of paragraph "f" of subsection 3 of Section 6373-2, where one is made subject to the requirement of a license because he offers

securities a part of whose proceeds may be used "directly or indirectly in payment for patents, services and good will and for property not located in this state."

It seems entirely clear that the owners of such property are not to be prejudiced because of its character. The law of the land gives to an inventor an unqualified right of property in his invention. We are aware that it has been held by the courts of last resort in several of the states, including Ohio, that the legislature may require that a note given for a patent right shall bear a statement of that fact upon its face. It has also been held that before one sells a patent right he may be required to file within the jurisdiction of the proposed sale a certified copy of the letters patent and evidence of authority to make the sale. These conclusions have been approved by this court in Allen vs. Riley, 203 U. S. 347, and in the case of Ozan Lumber Company vs. Union County National Bank of Liberty, 207 U. S. 251. We accept these decisions as conclusive upon the questions involved notwithstanding the weighty reasons for dissent in those cases and for decisions to the contrary upon the same subject. These reasons, however, should serve to prevent an extension of the view therein taken to other cases. These statutes were upheld as reasonable regulations of sales, not substantially interfering with their accomplishment. That palliation is not found in the provisions of this act, for, **in the exercise of his discretion the commissioner may prohibit the sale of the securities whose proceeds are to be used wholly or partly in the purchase of such property.** It was recognized in those cases that provisions substantially obstructing the sale would render that act void, as was held, and a violation of the act of congress upon the subject.

OTHER DISCRIMINATIONS VIOLATIVE OF FOURTEENTH AMENDMENT.

That a discrimination should be made on account of the contemplated use of the proceeds in paying for services, good-will, or for land not located in Ohio is contrary to the universal conception of lawyers and business men and to all of the decisions of which we have any knowledge.

(b) Similarly objectionable is the discrimination in paragraph "a" of the same section against an owner who disposes of securities "in the course of repeated and successive transactions of a similar character." All of these transactions are essentially private and in no way affected by a public interest. This statute recognizes that they are so as to a single transaction. That which is without reason is arbitrary. There is no reason to say that transactions change their character by increasing their numbers.

(c) Obviously offensive in this respect is the discrimination in paragraph "f" of Section 6373-9 in favor "of a licensee who is a member of a regularly organized and recognized stock exchange and who has an established and lawfully conducted place of business in this state regularly open for patronage as such."

This distorted feature of the act perhaps suggests its extra-legislative conception.

(d) Paragraph "d" of Section 6373-9 operates to the prejudice of an owner of securities of a taxing subdivision of another state, territory, province or foreign government.

(e) Paragraph "b" of Section 6373-10 operates to the prejudice of the owners of securities which have not been published from time to time for at least six months in the columns of a daily newspaper.

(f) Paragraph "c" of Section 6373-10 operates to the prejudice of those engaged in a transaction where the disposal is for less than five thousand dollars.

(g) Like discrimination appears in subsection 1 of Section 6373-2 where the transaction includes less than fifty per cent. of the amount of the total issue, a provision founded upon no reason and clearly to the prejudice of small dealers and purchasers.

The act is printed in the brief of our adversaries. To further present the reasons for urging its invalidity resort must be had to the detailed provisions of the act, and we present the following condensed summary showing most of those which we think are fatal to its validity.

I. It requires that one who is about to exercise the constitutionally guaranteed right to make contracts and exercise dominion over his property shall be required, at expense, labor and delay, to seek additional authority.

II. It assumes to condition the right to transact ordinary business upon the reputation of the applicant and confers upon the commissioner arbitrary power to determine what that reputation is without a hearing and without legislative standards.

III. It imposes a license fee of fifty dollars per annum and five dollars additional for each agent that one may employ, and makes the impracticable requirement that the names and addresses of all such agents shall be given in advance.

IV. It confers arbitrary power upon the commissioner to regulate the transactions of one who has obtained a

license and makes discriminations and arbitrary qualifications which are forbidden. Prominent among such discriminations are between the cases where more or less than fifty per cent of an issue of bonds is included in the sale to one person; between securities which have and which have not been authorized by the public service commission of this state; between the securities issued by a bank, trust company, a building and loan association organized under the laws of this state and those which are not; between an **owner** who sells his securities in a single transaction and one who disposes of them in successive transactions; between a bank or trust company who sells at a commission of not more than two per cent. and one which sells at a higher commission; against securities when any part of the proceeds to be derived from the sale are to be applied in payment for patents, services, good will or for property not located in this state; in providing for such delays in the issuance of a license and in the subsequent conduct of business thereunder as to substantially hinder, and in many cases naturally arising, to utterly prevent sales; in discriminating between securities which have and which have not been published in regular market reports; between sales where in a single transaction the sale is for five thousand dollars or more; in discriminations against securities issued by taxing subdivisions of other states; between securities upon which there has and has not been a default as to principal or interest; against securities which have not from time to time for six months been published in the regular market reports of the news columns of a daily newspaper of general circulation in the state; where the se-

curities are or are not of manufacturing or transportation companies in the hands of bona fide purchasers prior to March 1st, 1914, where such companies were, on that date and shall be at the time of the proposed sale, going concerns; between cases where the information contemplated is or is not contained in a standard manual of information approved by the commissioner; where the disposal is or is not made for a commission of less than one per cent. of the par value thereof by a licensee who is a member of a regularly organized and recognized stock exchange and who has an established and lawfully conducted business in this state regularly open for public patronage as such; between cases in which the vendor proposes to sell securities for which he has and those for which he has not paid ninety per cent. of the price at which they are to be sold by him; where the securities are or are not those of a common carrier or of a company organized under the laws of this state and engaged principally in the business of manufacturing, transportation, etc., and the whole or a part of the property upon which such securities are predicated are located within this state.

Section 6373-16 assumes to authorize the commissioner before and after issuing a certificate to a licensee to conduct a particular transaction to make such examination as he may deem advisable, such examination to occupy as much time as the commissioner may deem advisable, and at his discretion to be wholly at the expense of the licensee, into the property which is the basis of the securities whose sale is contemplated. This is true even though the securities offered may be those of a mining corporation in South Africa and the contemplated sale

may be to one who has the amplest knowledge of the properties and although the delay and expense of the examination may entirely prohibit the transaction.

Pages of the brief for appellant suggest a total misapprehension of oft repeated language of the courts expressive of regard for the primary authority of General Assemblies. Counsel seem to regard it as a rule for raising doubts instead of a rule for resolving serious doubts that may arise out of a case. To show that to raise doubts is not its function, it is only necessary to advert to the fact that no court has ever declared that it affirmed the validity of a statute out of respect for the legislative body which enacted it. On the contrary, in all of the cases in which acts have been held valid after such compliments have been bestowed upon the legislative function, the courts have always proceeded to give legal reasons for their judgment, and it is oft repeated "as being of the essence of constitutional law that an act repugnant to the constitution is void and the courts must so hold." In other words, the invincible logic of *Marbury vs. Madison* is still recognized.

THIS ACT RAISES OTHER QUESTIONS OF GRAVE IMPORTANCE.

By whom but a judicial tribunal can it be determined "that the law has been complied with," the determination to operate as a predicate to restrict one's use of his property; or that business is or is not "fraudulently conducted?" In the absence of fraud, where may authority be found in any department of the government to determine that securities are offered for sale on "unfair terms?"

If such authority could be found anywhere, would not its exercise be conditional upon a "hearing?" Is a legislative act which provides for such conditions arising frequently in the actual conduct of business as will absolutely prevent sales less offensive than an act which in terms prohibits them? Is not one whom a petty administrative official may deem to be of bad repute still "*a person within the jurisdiction*" of the state and **entitled to the equal protection of the laws?**

The authority of the legislature to punish fraud is limited only by the inhibition of cruel and unusual punishment, and its prevention is within the power of the legislature, which may be able to devise an efficient measure to that end which will not interfere with the freedom of normal commerce. The value of that freedom received early recognition. It was the most urgent consideration for the adoption of the constitution. It was known to rest upon the sanctity of contracts. The right to make contracts not inimical to public weal with the right to their judicial enforcement is doubtless of more value to the people of the land than all of its taxable property. Indeed, the value of taxable property depends chiefly upon the owner's right to contract with respect to its use and usufruct. So important was this right in the appreciation of those who feared its invasion by Congress that the due process clause was placed in the fifth amendment. The serene confidence then reposed in the legislatures of the states abated with experience and observation. We may not know to what extent this was due to observations of the influence of promoters of legislation, itself inimical to the public weal—sometimes to the extent of creating trusts. Comprehensively these causes were embraced in the guarantees of the fourteenth amendment.

RATIONAL RULE.

The freedom of commerce has been the object of enduring solicitude. Its security has been greatly enhanced by reason of the beneficent decisions of this court establishing a rational rule for the condemnation of contracts void by the tests of the common law, and saving the normal contracts of commerce. This is done by tests which business men and their advisers find comparatively easy and certain of application. Is it not pertinent to inquire: Could any one formulate what he would himself regard as a rule of reason which would conduct to the conclusion that this court should in one of its adjudications affirm the judgment of an inferior court imposing penalties which the anti-trust laws prescribe for the punishment of citizens who enter into engagements to place restrictions upon the freedom of commerce, and in another to affirm the validity of legislation which places like restrictions on the freedom of commerce? Do not the provisions of this act suggest the evil effects of trusts so established as to be beyond the reach of courts except by the firm maintenance of these constitutional safeguards?

PERTINENT CITATIONS PRELIMINARY TO THE DISCUSSION OF THE COMMERCE CLAUSE OF THE CONSTITUTION.

We think it appropriate in a preliminary way to cite the observation of Mr. Justice Strong in the case of *The Hannibal & St. Joseph Railroad Company vs. John F. Husen*, 95 U. S. 465. It is applicable to the Ohio blue sky law in all of its interstate commerce phases:

"The police power of a state cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise; and under color of it objects not within its scope cannot be secured at the expense of the protection afforded by the federal constitution. And as its range sometimes comes very near to the field committed by the constitution to congress, it is the duty of the courts to guard vigilantly against any needless intrusion."

We likewise in a preliminary way think it equally appropriate to quote the language of Mr. Justice Field in the case of *Welton vs. Missouri*, 91 U. S. 275, as especially applicable to the provisions of the Ohio statute, which discriminate against the securities of taxing subdivisions of other states, territories, provinces and foreign governments, and to the stocks and obligations of banks, trust companies, building and loan associations organized under the laws of other states and other features of the act discriminatory against citizens of other states:

"Following the guarded language of the court in that case, we observe here, as was observed there, that it would be premature to state any rule which would be universal in its application to determine when the commercial power of the federal govern-

ment over a commodity has ceased, and the power of the state has commenced. It is sufficient to hold now that the commercial power continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character. That power protects it, even after it has entered the state, from any burdens imposed by reason of its foreign origin. The act of Missouri encroaches upon this power in this respect and is, therefore, in our judgment, unconstitutional and void."

THE BLUE SKY LAW OF OHIO CONTRAVENES THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION.

The opinion of Judge Sater so clearly discloses that the Ohio blue sky law contravenes the commerce clause of the federal constitution that we feel that the discussion of the question in this brief should be as short as due regard for the presentation of opposing notions by counsel for the appellant will permit. A long course of reasoning is indulged in by opposite counsel in their brief, and an attempt made to show that the principles underlying the Ohio blue sky law leave it within the control of the cases of Nathan vs. Louisiana, 8 Howard, page 73, and Paul vs. Virginia, 8 Wallace, 168, and not as found by the District Court within the cases of the International Text-book Company vs. Pigg, 217 U. S., 91, and the Buck Stove & Range Company vs. Vickers, 226 U. S. 205, 213-216, and the Lottery Cases, 188 U. S., 321. An attempt is made by counsel to show that the District Court of Michigan, in the case of Alabama & N. O. Transportation Company vs. Doyle, 210 Fed. Rep., 173, as a predicate for its conclusion held that the Supreme Court of the United States in the lottery cases overruled the doctrines ob-

taining in the cases of Nathan vs. Louisiana and Paul vs. Virginia. This assumption is entirely without foundation. The Federal Court in the Michigan case state in this connection:

"However, if either of these cases might otherwise be thought now controlling, we think the opinion in the lottery cases requires the contrary result."

This is far afield from saying that the cases of Nathan v. Louisiana and Paul v. Virginia were overruled. We make no claim that these cases have been overruled or modified, but, on the contrary, assert that their doctrines have been repeatedly upheld by this court. However, as stated by Chief Justice Waite, *infra*, Paul v. Virginia is not controlling in the case of a corporation engaged in interstate commerce. A fair conclusion with reference to the Michigan opinion in that connection is that the Michigan case came within the principle of the lottery cases.

So illuminating is the opinion of Judge Sanborn in the case of Butler Bros. Shoe Company vs. U. S. Rubber Company, 156 Fed. Rep. page 1, that we quote from it at some length:

"In Pennsylvania Telegraph Company vs. Western Union Telegraph Company, 196 U. S. 1, 8, the state of Florida had granted to the Pensacola Telegraph Company the exclusive right to establish and maintain lines of electric telegraph in certain counties of the state, and the Western Union Telegraph Company, a foreign corporation, sought to erect a line of telegraph therein. Chief Justice Waite opened the opinion of the court in that case in these words:

'Congress has power to regulate commerce with foreign nations and among the several states and to establish post offices and post roads. The constitu-

tion of the U. S. and the laws made in pursuance thereof are the supreme law of the land. The law of congress made in pursuance of the constitution suspends and overrides all state statutes with which it is in conflict. Since the case of Gibbons vs. Ogden, 9 Wheaton, 1, it has never been doubted that **commercial intercourse** is the element of commerce which comes within the regulating power of congress', and he announced the unanimous opinion of the court that the grant of exclusive right of the state of Florida to the Pensacola Company, and its attempts thereby to exclude the corporations from certain portions of the state were futile."

Of the case of Paul v. Virginia, he said:

"We are aware that in Paul vs. Virginia, 8 Wall., 168, this court decided that a state might exclude the corporation of another state from its jurisdiction, and that corporations are not within the clause of the constitution which declares that 'the citizens of each state shall be entitled to all privileges and immunities of citizens of several states.' Art. IV, Section 2. This was not, however, the case of a corporation engaged in interstate commerce; and nothing was said by the court to show that; if it had been very different questions would have been presented."

We feel sure that this is the consideration which the District Court of Michigan have in mind. From this it is apparent that in any matters of interstate commerce a state may not interfere from any angle. It matters not whether the corporation be foreign or domestic.

That there are other elements in commerce than transportation appears clear from what is said by the court in the case of Lyng v. Michigan, 135 U. S., 161, as follows:

"We have repeatedly held that no state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce or on the

receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce and amounts to a regulation of it, which belongs solely to congress. *Leloup v. Mobile*, 127 U. S. 640, 648 (32311, 314), and cases cited. In *Bowman v. Chicago N. & W. R. Co.*, 125 U. S. 465 (31; 700), it was decided that a section of the code of the state of Iowa forbidding common carriers to bring intoxicating liquors into the state from any other state or territory, without first being furnished with a certificate as prescribed, was essentially a regulation of commerce among the states, and not being sanctioned by the authority, express or implied, of congress, was invalid because repugnant to the constitution of the United States; and in *Leisy v. Hardin* (*ante*, p. 128), the judgment in which has just been announced, that the right of importation of ardent spirits, distilled liquors, ale and beer from one state into another, includes, by necessary implication, the right of sale in the original packages at the place where the importation terminates; and that the power cannot be conceded to a state to exclude, directly or indirectly, the subjects of interstate commerce, or, by the imposition of burdens thereon, to regulate such commerce, without congressional permission. The same rule that applies to the sugar of Louisiana, the cotton of South Carolina, the wines of California, the hops of Washington, the tobacco of Maryland and Connecticut, or the products, natural or manufactured, of any state, applies to all commodities in which a right of traffic exists, recognized by the laws of congress, the decisions of courts, and the usages of the commercial world. It devolves on congress to indicate such exceptions as in its judgment a wise discretion may demand under particular circumstances. *Lyng* was merely the representative of the importers, and his conviction cannot be sustained, in view of the conclusions at which we have arrived."

DISCUSSION OF CASE OF NATHAN VS. LOUISIANA.

Indeed the case of Nathan vs. Louisiana, 8 How. 75, is an authority for the appellees, the court saying:

"Foreign bills of exchange are instruments of commerce, it is true."

It may be said here that it is so obvious that stocks, bonds and commercial paper are articles of commerce as that nothing further in support thereof need be said. The only question, then, is: Does the Ohio blue sky law in its operation interfere with the use of these articles of commerce in interstate commerce? It will be kept in mind that the Louisiana law, in the case of Nathan vs. Louisiana, was a tax law. The Ohio blue sky law is not a tax law, nor is it an inspection law; its dominant characteristics are prohibitory. In the Nathan case, Mr. Justicee McLean says:

"The right of a state to tax its own citizens for the prosecution of any particular business or profession within the state has not been doubted. We find that in every state money or exchange brokers, venders of merchandise of our own or foreign manufacture, retailers of ardent spirits, tavern keepers, auctioneers, those who practice the learned professions, and every description of property, not exempted by law are taxed. As an exchange broker, the defendant had a right to deal in every description of paper and in every kind of money; but it seems his business was limited to foreidgn bills of exchange. Money is admitted to be an instrument of commerce and so is a bill of exchange, and upon this ground, it is insisted that a tax upon an exchange broker is a tax upon the instrument of commerce."

He would be a bold man indeed who would now assert that the national right was infringed upon by the passage of a law similar to the Louisiana one. The courts will not deny to a state, unless absolutely necessary to preserve intact the federal constitution, the right to maintain its best interests as subserved through the necessary medium of taxation.

"The power of taxation is indispensable to their (states') existence and is a power which, in its own nature, is capable of residing in and being exercised by, different authorities at the same time * * * there is no analogy then between the power of taxation and the power of regulating commerce."

Gibbons v. Ogden, 9 Wheaton, 1.

The Louisiana statute was a tax upon a business.

PAUL VS. VIRGINIA BRIEFLY DISCUSSED.

The essence of Paul vs. Virginia, 8 Wallace, 168, is that the right of a foreign insurance company to do business in a state is subject to license, and that a state in imposing conditions upon a foreign insurance company before it may receive such license is not contravening the commerce clause of the constitution of the United States, and the court there held that an insurance policy was merely a personal contract, and that issuing a policy of insurance is not a transaction of commerce. Mr. Justice Field in that case said:

"They (insurance policies) are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one state to another and then put up for sale. They are like other personal contracts between parties which are completed by

their signature and the transfer of a consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different states."

This doctrine has been affirmed in a number of cases. We refer in this connection only to the case of New York Life Insurance Company vs. Deer Lodge County, 231 U. S. 495, where the court say:

"The decision of the cases is that contracts of insurance are not commerce at all, neither state or interstate. This is the answer to the contention of the insurance company. The company realizes it to be an obstacle and has attempted to remove it by detailing the manner of conducting its business as demonstrating that its policies are interestate contracts. We have replied to the attempt and shown that its manner of business has no such effect. It follows, necessarily, therefore, that neither the lottery case nor the Pigg case impugns the authority or the application of the cited cases. They, the Lottery case and the Pigg case, were concerned with transactions which involved the transportation of **property** and were not mere personal contracts."

Quoting further:

"Commerce was defined, quoting Mr. Justice Field, Mobile county vs. Kimball, 102 U. S. 691, 702, to "consist in intercourse and traffic, including in these terms navigation and transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities."

It suggests itself as a matter of common sense that the subject of insurance is properly a matter of state regulation. Insurance is a community matter. Fire becomes a community matter whether the citizens be **nolens** or **volens**. Indeed an honest man needs fire insurance irrespective of his own acts. His losses usually come to him

through the acts of those over whom he has no control. The tossing of a match into a waste basket or the explosion of a gasoline tank may affect the financial interests of a whole city, so that looked at from either of two angles, the one that an insurance policy is a mere personal contract and not a subject of traffic, barter, or sale, and the other that the entire public are interested in insurance and must for their safety insure, the holding that the insurance business is subject to state regulation is far from giving support to the claim that the state has the right to regulate the sale of stocks, bonds and other securities.

DOES THE CASE AT BAR COME WITHIN THE PRINCIPLES OF THE CASES OF NATHAN VS. LOUISIANA AND PAUL VS. VIRGINIA OR DOES IT COME WITHIN THE PRINCIPLES OF THE LOTTERY CASES AND THE CASE OF INTERNATIONAL TEXTBOOK COMPANY VS. PIGG AND BUCK STOVE AND RANGE COMPANY VS. VICKERS?

The District Court held that it came within the latter set of cases. Was the District Court right? Counsel for appellant in their brief, page 81, say:

“The business of the Geiger-Jones Company so far as affected by the Blue sky law is intra-state. There is not disclosed in their bill any question of transportation.”

Let us see what is in the petition in the Geiger-Jones case bringing it under the head of the commerce clause of the constitution. The petition alleges:

“That the general nature of the business in which said corporation is engaged, and in which it is au-

thorized to engage, as appears from its articles of incorporation, is that of buying and selling investment securities, its business consisting principally of buying and selling the stocks and bonds of industrial corporations; that as a corporation it has been since the year 1907 actively engaged in the marketing of the kinds of securities aforementioned with the result that it has sold and there is now standing in the hands of persons to whom it has sold securities amounting to twenty to twenty-five million dollars par value. * * * * that said Geiger-Jones Company has a regular established clientele of approximately eleven thousand persons residing in the state of Ohio **and other states**; that the stockholders in the plaintiff company consist of several hundred persons residing in the state of Ohio **and in other states**; that the securities above referred to as having been sold and disposed of by plaintiff consist of the securities of over twenty corporations organized and existing under and by virtue of the laws of Ohio **and other states and foreign countries**; that not one of the eleven thousand clients to whom the plaintiff has sold the securities above referred to has ever suffered or incurred any loss because of his investments in said securities; that the plaintiff in the course of its business has marketed and is now marketing the securities of Ohio corporations and citizens in other state of the United States and in foreign countries; that it has sold and is now selling the **securities of citizens and corporations of other states and foreign states in the state of Ohio and in other states**; and that said plaintiff is and has been engaged in intra-state, interstate and foreign commerce."

No pleading of any kind was filed by the appellant in the District Court, and the allegations herein made stand as admitted as true. Assuming that the instruments referred to are articles of commerce, it seems clear to us that the allegations of the petition bring the plaintiff clearly within the protection of the commerce clause of

the Constitution of the United States. Little wonder that Judge Sater in his opinion on this branch of the case said:

"If the act be unconstitutional, each of the plaintiffs is, as he must be, within the class whose constitutional rights are invaded."

However, we shall give some attention to the statement of plaintiff's counsel that "there is not disclosed in their bill any question of transportation." There is much discussion in appellant's brief upon the proposition that the Lottery cases dealt with the **transportation** of lottery tickets. The answer to counsel's contention is that transportation is but an element of interstate commerce.

Counsel lose sight of the legal fact that sale is an essential ingredient of commerce. Mr. Justice Story, in "Story on the Constitution," Section 1072, says:

"Commerce is intercourse; and one of its most essential ingredients is traffic. It is inconceivable that the power to authorize traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuation is indispensable to its value. To what purpose should be the power to allow importation be given, unaccompanied with the power to authorize the sale of the thing imported? Sale is the object of importation and it is an essential ingredient of that intercourse of which importation constitutes a part, as congress have the right to authorize importation they must have the right to authorize the importer to sell. What would be the answer if a foreign government should be informed that its merchants after importation, were forbidden to sell the merchandise imported?"

This is the doctrine appearing in the case of *Lyng vs. Michigan*, supra.

Assuming that stocks and bonds are articles of commerce, if a citizen of Pennsylvania by mail ordered the

transportation to him of a number of bonds to be sent from Canton, Ohio, the place of business of the Geiger-Jones Company, the sale, one of the ingredients of interstate commerce, would be effected at Canton. We assume that it would not be denied that if a quantity of groceries were ordered shipped from Canton to some point in Pennsylvania and were shipped, the transaction would be a transaction under interstate commerce. The two are identical if bonds and stocks be articles of commerce. Let us see where the blue sky law would interfere.

The very first section, 6373-1, provides:

"Except as otherwise provided by this act, no dealer shall, within this state, dispose or offer to dispose of any stock, stock certificates, bonds, debentures, collateral trust certificates, or other similar instruments evidencing title to or interest in property issued or exercised by any private or quasi public corporation, co-partnership, or association or by any taxing subdivision of any other state, territory, province or foreign government, without first being licensed so to do, as hereinafter provided."

It appears that the very first element involved in interstate commerce is prohibited without permission from the state. It is difficult to answer an argument resting upon no foundation. We see no parallel between the case at bar and the cases of *Nathan vs. Louisiana* or *Paul vs. Virginia*, and the District Court evidently did not think it worth while after mature consideration of the learned opinions of the judges in passing upon the other blue sky cases, to make reference to the cases so confidently relied upon by appellant's counsel. It appears from the petition of the Geiger-Jones Company that "it has sold and is now selling the securities of citizens and corporations of other states and foreign states in the state of

Ohio and in other states." It requires no stretch of imagination to conclude that a company at Canton, Ohio, which sells the securities of citizens and of corporations of other states and foreign states must import such securities. If the company be prohibited, as it is, from selling such securities, in the first instance as a dealer, it is in substance prohibited from importing them. Stocks and bonds are not articles of consumption. The object of importation in each and every instance is sale so far as a dealer is concerned. The act itself, therefore, prohibits an Ohio dealer from trafficking in articles of interstate commerce so long as the sale is to be effected in Ohio.

The district courts in the two Michigan cases, in the Iowa case, in the West Virginia case, and in this case, held without hesitation that dealers in stocks and bonds who sold to citizens of different states, making use of the usual instruments of traffic, such as the mails, the telegraph and the telephone, were engaged in interstate commerce. The only dissent in any of the cases where the full court sat is that of Judge Wood in the West Virginia case.

With respect to the dissenting opinion of Judge Wood it is sufficient to say that it is not predicated upon any view which he took respecting any constitutional question here involved. It was based wholly upon his peculiar interpretation of the West Virginia statute, and that interpretation plainly could not be made with reference to the Ohio act.

**THE HOLDING IN THE CASE OF THE BUCK
STOVE & RANGE COMPANY VS. VICKERS,
229 U. S. 205.**

The district court in Ohio followed the principles laid down in the case of The Buck Stove & Range Company vs. Vickers, 229 U. S. 205. Mr. Justice VanDevanter in the opinion in that case said:

"As accurately reflecting what was held in the Pigg case we excerpt the following from the opinion of the court delivered by Mr. Justice Harlan (pages 109-112):

"That to carry on interstate commerce is not a franchise or privilege granted by the state; it is the right which every citizen of the United States is entitled to exercise under the constitution and laws of the United States; and the case of mere corporate facilities as to the matter of convenience in carrying on their business, cannot have the effect of depriving them of such right unless congress should see fit to interpose some contrary regulation on the subject. How far a corporation of one state is entitled to claim in any state where it is doing business, equality of treatment with individual citizens in respect to the right to sue and defend in the courts is a question which the exigencies of this case do not require to be definitely decided. It is sufficient to say that the requirement of the statement mentioned in 1283 (1358 General Statutes—1905) of the statute imposes a direct burden on the plaintiff's right to engage in interstate business, and therefore is the violation of its constitutional rights. It is the established doctrine of this court that a state may not in any form or under any guise burden the prosecution of interstate business, but such a burden is imposed when a corporation of another state, lawfully engaged in interstate business is required, as a condition of its right to prosecute its business in

Kansas to make and file a statement setting forth certain facts which the state confessedly could not control by legislation. It results that the provision as to the statement mentioned in 1283 (1358 General Statutes—1905) must fall before the constitution of the United States, and with its established rules and statutory constructions must follow that part of the same section which provides that the obtaining of the certificate of the secretary of state that such statement has been properly made, shall be a condition precedent to the right of the plaintiff to maintain an action in the courts of Kansas."

Counsel for appellant in their brief at page 106 say:

"In this same connection it is to be observed that the International Textbook Company vs. Pigg case, relied upon by some of the courts in perhaps a little different connection, does not militate against the theory above outlined; for the business transacted by the International Textbook Company in the state of Kansas as shown by the record of that case, involved the making of contracts in that state, calling for the **delivery there** from a point in Pennsylvania of tangible property, viz., books, which are in every sense commodities."

We fail to see any distinction. The Geiger-Jones Company may accept at Canton, Ohio, a letter containing an offer from a firm in another state of stocks and bonds, and the principle would be exactly similar to the transaction in the case of the International Textbook Company vs. Pigg. We do not understand that the shipment has to be one of tangible property. Interstate commerce is certainly not limited to tangible property, nor even to commodities. Webster in his definition of commodities excepts animals, and we assume that appellant's counsel would not make the claim that animals are not subjects of interstate commerce, merely because not included in

the term "commodities." The answer to all of the contention of appellant's counsel under this head is found in Judge Sater's opinion, from which we quote:

"Because a certificate of stock is only evidence of the ownership of shares, the interest represented by them being held by the company for the benefit of the true owner (*Citizens Sav. & Tr. Co. v. Ill. Cent. R. R.* 205 U. S. 46, 57; *Bank v. Mfg. Co.* 67 Ohio St. 306, 314), it does not follow, as defendants' counsel contend, that such certificate is of less value than an unprinted sheet of paper of corresponding size and quality, and that it cannot therefore be a subject of interstate commerce. If it be but written evidence of an interest in corporate property, the same may be said of notes and bills, which are mere evidence of indebtedness on the part of individuals or corporations that issue them. In *Merritt v. American Steel-Bars Co.*, 79 Fed. Rep. 228, 235, C. C. A. 8, in speaking of stock certificates, it was said that:

"In the business world such obligations or securities are treated as something more than mere muniments of title. They are daily bought and sold like ordinary chattels, they may be hypothecated or pledged, they have an inherent market value, and, while differing in some respects from chattels, they are generally classified as personal property."

In Ohio a stock certificate is so far property that it may be seized by an officer making an attachment or levy. Sec. 8673-13 G. C."

POWER OF CONGRESS OVER INTERSTATE COMMERCE—WHEN EXCLUSIVE.

We concede that this court has recognized the clear distinction between those cases in which state regulations are admissible and those in which they are not. Whatever subjects of commerce are in their nature national, or admit of one uniform system or plan of regu-

lation, are to be regarded as under the exclusive control of Congress; other subjects, which are to be regulated in view of local circumstances and facts, and which can usually be best regulated by the state are subject to such regulation so far as it does not interfere with any action of congress. In this category belong regulation of pilots, construction of bridges over navigable waters, etc. This doctrine appears clear from a consideration of the following cases:

- Crandall v. Nevada, 6 Wall., 42;
- Steamship v. Portwardens, Id. 31;
- Ex parte v. McNeil, 13 Wall., 236.

This doctrine is expressly declared in the case of Sabine Robbins vs. Taxing District of Shelby County, Tenn., 120 U. S., 489. The first two propositions of the syllabus are as follows:

- "1. The power of congress to regulate interstate commerce is exclusive when its subjects are national in character or admit only of one uniform system or plan of regulation.
2. Where its power is exclusive, the failure of congress to make express regulations indicates its will that the subject shall be left free from restrictions or imposition."

Pertinent, also, to this question is the following:

"Where a subject of interstate commerce is national in character or admits of only one uniform system of regulation, the power of congress is exclusive; and its failure to make express regulations indicates its will that the subject shall be free."

Philadelphia Southern Mail Steamship C. v. Commonwealth of Pennsylvania, 122 U. S., 326.

Also

"A state cannot constitutionally impose upon a steamship company incorporated under its own laws

a tax upon its gross receipts derived from transportation of passengers by sea between states and to and from different countries."

Ibid.

"Neither a state nor its officials by the exercise of, or by the refusal to exercise, any or all of its powers, may substantially discriminate against interstate commerce or the right to carry it on."

Haskell vs. Cowham, 109 CCA, 235.

"Neither a state nor its officials by the exercise of, or by the refusal to exercise, any or all of its powers, may prevent or unreasonably burden interstate commerce in any sound article thereof."

Ibid.

Sanborn, Judge, in his opinion in that case, says:

"These contentions disregard the fundamental grant of the people to the nation of the power to regulate commerce among the states, and they are all answered by these simple and indisputable principles of law. No state by the exercise of, or by the refusal to exercise any or all of its powers, may prevent or unreasonably burden interstate commerce within its borders in any sound article thereof."

Henderson v. Mayor of N. Y., 92 U. S. 259, 271-272; Railroad Co. v. Husen, 95 U. S., 465, 471, 473;

Bowman v. Chicago, etc. R. R. Co., 125 U. S., 465, 474, 475, 479, 480-481, 484, 485, 488-489, 497, 507, 508;

Mugler v. Kansas, 123 U. S., 623-624.

"No state by the exercise of, or by the refusal to exercise, any or all of its powers, may substantially discriminate against or directly regulate interstate commerce or the right to carry it on."

Pullman Co. v. State of Kansas, 216, U. S. 56, 65; Darnell & Co. v. Memphis, 208 U. S. 113, 120-124;

Minnesota v. Barber, 136 U. S. 313.

Brehmer v. Redman, 138 U. S. 78.

Voight v. Wright, 141 U. S. 62.

Judge Sanborn in this same case further says:

"The power to regulate commerce among the states is carved out of the general sovereign power when the national government was formed and granted by the people by means of the constitution to the congress of the U. S. Art. I, Sec. 8. That grant is exclusive. The nation may exercise the power thus given to its utmost extent, and no state may lawfully restrict or infringe this grant or the plenary exertion of its powers, for they are paramount to all the powers of the state and they inhere in the supreme law of the land.

"Interstate commerce in natural gas, including therein its transportation among the states by pipe line, is a subject national in its character and susceptible of regulation by uniform rules. The silence or inaction of congress relative to such subject is a conclusive indication that it intends that interstate commerce therein shall be free, and any law or act of a state or of its officials which prohibits it or substantially restrains its freedom, is violative of the constitution and void."

Welton v. State of Mo., 91 U. S. 275-282;

Brown v. Houston, 114 U. S. 622;

Walling v. Mich., 116 U. S., 446;

Case of the state Freight Tax, 15 Wall. 232.

"Interstate commerce in sound and well recognized articles of commerce must be free, and any prohibition, obstruction, or burden of it by a state statute, is unconstitutional. Such commerce may not be regulated by state at all. The exclusive power to regulate commerce among the states is vested in the Congress."

156 Federal, page 1.

"The inaction of congress in prescribing rules to govern interstate commerce, is equivalent to its declaration that such commerce shall be free from any restrictions."

Welton v. Mo., 91 U. S. 275-282.

Justice Field in the opinion delivered in that case, said:

"It will not be denied that that portion of commerce with foreign countries and between the states which consists in the transportation and exchange of commodities is of national importance, and admits and requires uniformity of regulation. The very object of investing this power in the general government was to insure this uniformity against discriminating state legislation. The depressed condition of commerce and the obstacles to its growth previous to the adoption of the constitution, from the want of some single controlling authority, has been frequently referred to by this court in commenting upon the power in question.

"It was regulated," says Chief Justice Marshall, in delivering the opinion in *Brown v. Maryland*.

"By foreign nations, with a single view to their own interests; and our disunited efforts to counteract their restrictions were rendered impotent by want of combination. Congress, indeed, possessed the power of making treaties; but the inability of the federal government to enforce them became so apparent as to render that power in a great degree useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the federal government contributed more to that great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by congress. *Brown v. Maryland*, supra."

"The power which insures uniformity of commercial regulation must cover the property which is transported as an article of commerce from hostile or interfering legislation, until it has mingled with and become a part of the general property of the country, and subjected like it to similar protection,

and to no greater burdens. If, at any time before it has thus become incorporated into the mass of property of the state or nation, it can be subjected to any restrictions by state legislation, the object of investing the control in congress may be entirely defeated. If Missouri can require a license tax for the sale by traveling dealers of goods which are the growth, product or manufacture of other states or countries, it may require such license tax as a condition of their sale from ordinary merchants, and the amount of the tax will be a matter resting exclusively in its discretion.

The power of the state to exact a license tax of any amount being admitted, no authority would remain in the United States or in this court to control its action, however unreasonable or oppressive. Imposts operating as an absolute exclusion of goods would be possible, and all the evils of discriminating state legislation, favorable to the interests of one state and injurious to the interests of other states and countries, which existed previous to the adoption of the constitution, might follow, and the experience of the last fifteen years shows would follow, from the action of some of the states."

Every word of what is said by Justice Field is applicable to the case at bar. A consideration of the blue sky cases discloses the ingenuity of counsel to distinguish the statute they are defending from other blue sky statutes. The attorneys general of the different states at the same time are co-operating with each other in the hope of evolving some uniformity of legislation. How may we have this uniformity of legislation? Only by the act of congress. The attorney general of Ohio invites the attention of this court to his claim that the Ohio law was changed to meet the decision of the U. S. Court (Record page 47).

Various records of the blue sky cases now before this court afford the most abundant proof of the necessity for uniformity of legislation if any legislation be desired at all, upon the subject of the regulation of the sale of stocks and bonds.

THE OHIO ACT MOST OBNOXIOUS AND MOST BURDENsome TO INTERSTATE COMMERCE.

We shall not burden the court with a reproduction of all the provisions of the Ohio statute violative of the commerce clause of the federal constitution. That subject is lucidly and forcibly referred to in the opinion of Judge Sater. It may be said in a few words that under the provisions of the Ohio act interstate commerce in respect to the articles covered by the Ohio act is prohibited entirely except under permission granted by the state. So burdensome is the Ohio act upon interstate commerce in this respect that interstate commerce business may not be transacted at all in regard to stocks and bonds without a permit from a state official, and these permits do not issue as a matter of fact, but upon consideration of the superintendent of banks and banking of the applicant's repute for business. If the "commissioner" ascertain (and this may be in any way he sees fit) that the licensee is of bad repute for business, his license may be revoked and his business discontinued. If the licensee has violated any provision of the act his license may be discontinued. It matters not how minor this violation be. If the "commissioner" ascertain that the licensee has engaged, or is about to engage in illegitimate business or any fraudulent transactions, his license may be revoked. The "commissioner" is thus clothed with the

power of "ascertaining" what business is legitimate and what is illegitimate, a question that at times is exceedingly troublesome for the courts.

It was with great warrant that Judge Sater in his opinion said:

"The draughtsman of the act here in question, unwittingly, no doubt, but with strange fatality, incorporated into it substantially all of the vices of the statutes considered in the above named cases, and added others equally, if not more, obnoxious. The burdens which it imposes on interstate commerce are so direct, positive and substantial as to lend peculiar force to the rule announced in the Pigg, Vickers and Crutcher cases and to vitiate the entire act for the reason that its constitutionally offensive features are so distributed through its various parts as to be inseparable. The enforced suspension from all business activity for a period of thirty days, imposed by the original Michigan act, was held to be a fatal "30-day paralysis." In the later decision rendered by the same court (*Halsey & Co. v. Merrick*) the subsequent act of that state was overthrown, notwithstanding the absence of such restrictive provision. In the present act the prohibition from the transaction of business must extend for a week, and possibly twenty or thirty days, or more; it therefore offends against the constitution quite as much as the first of the Michigan acts."

THE STATE NOT WITHIN THE LEGITIMATE EXERCISE OF ITS POLICE POWERS IN ENACTING THE BLUE SKY LAW.

It is conceded that if the subject matter is within the police power of the state, which is denied strenuously, the state in the exercise of that power could affect interstate commerce incidentally, and this would be the limit of the state's power. The business of dealing in stocks and

bonds, the normal contracts of commerce, is predominantly private and therefore of course not subject to the police power of the state in any instance.

The question before us now under the head of "Interstate Commerce" is, has the state of Ohio the right to prevent an Ohio corporation from selling its private property to a citizen of another state? A contract of sale at Canton, Ohio, of stocks and bonds to be transported to a citizen of another state is a transaction of interstate commerce. Interstate commerce involves, as before stated, more elements than mere transportation. It involves the right to buy and sell at either terminus:

"All sales of sound articles of commerce which necessitate the transportation of the goods sold from one state to another, are interstate commerce; but all interstate commerce is not sales of goods. Importation into one state from another is the indispensable element, the test of interstate commerce; and every regulation contract, trade and dealing between the different states, which contemplates and gives such importation, whether it be of goods, persons, or information, is a transaction of interstate commerce."

Butler Bros. Shoe Co. v. U. S. Rubber Co., 156 Fed. 17.

Counsel for appellant fall into the fundamental error of assuming that transportation is the whole of interstate commerce.

"The language of the grant makes no reference to the instrumentalities by which commerce may be carried on. It is general and includes alike commerce of individuals, partnerships, associations, and corporations."

Butler Bros. Shoe Co. v. U. S. Rubber Co., 156 Fed. 1, 17, 8 Wallace, 82, 183

The court in *Adams Express Company vs. New York*, 232 U. S. 14, citing *Crutcher vs. Kentucky*, 141 U. S. 47, say:

"A state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it."

The court further observes in the same case:

"While the exercise of the police power essential for the protection of the community may extend incidentally to operations of interstate commerce, the police power does not justify the imposition of direct burdens on that commerce nor its subjection to unreasonable regulations."

It appears, therefore, immaterial what the instrumentalities of interstate commerce may be. The state has no power of regulation or control over it. It is true that the state may regulate its own creatures, but it is not to be presumed that the legislature of Ohio intended to discriminate against a domestic corporation, or permit individuals and partnerships to sell stocks and bonds, and at the same time deny corporations to do likewise.

"Since the case of *Gibbons v. Ogden*, 9 Wheat. 1, said Chief Justice Waite, in *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S., page 8, 'it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of congress.' The contracts before us constituted and caused commercial intercourse between citizens of different states. Their chief purpose and their principal effect were the importation of sound articles of commerce into the state of Colorado, from other states, and they necessarily constituted transactions of interstate commerce."

Butler Bros. Shoe Co. v. U. S. Rubber Co. 156 Fed.

So, necessarily, the contracts of the Geiger-Jones Company entered into at Canton for the transportation of sound articles of commerce to citizens of sister states, were transactions of interstate commerce.

In the case of Haskell v. Cowham, 109 U. S. Cir. Ct. of Appeals, page 235, it appears that the state of Oklahoma, through its officers, sought to prevent, and threatened to continue to prevent, one Cowham from selling his gas under interstate commerce by preventing him from conducting it out of the state. The right to be protected in that case was the right of a private citizen by means of his ownership of gas to transport it for sale. This right was a property right, and was so held by the court. And the right to sell any legitimate article of commerce is a property right. The court held that the state within the exercise of its police power was without the right to prevent the owner of the gas from transporting it out of the state for the purpose of sale.

The court in that case held that the reason for the rule which gives the state the right to prohibit the transportation of the waters of rivers, lakes and ponds does not exist in the case of the prohibition of transportation out of the state of articles owned by private parties. It appears, therefore, obvious that the state has no power to prevent the sale within its borders of a sound article to be shipped to a sister state.

Tested by the principles laid down in the foregoing case, how stands the Ohio blue sky law?

Under it a stock or bond may be worth dollar for dollar in the gold coin of the realm, and yet it may not be sold within the state to be transported out of the state without permission from the superintendent of banks and

banking, and the superintendent of banks and banking may not permit a dealer to handle securities of that kind if, in his judgment, exercised in his own way, such dealer is not of good business repute.

The attorney-general would have the court to believe that it is in accordance with the law of the land to leave to one state officer the right to determine who is of sufficiently good repute to sell sound securities. Moreover, there is a discrimination against the securities of taxing subdivisions of any other state, territory, or province or foreign government. The bonds of a county in Pennsylvania could not be sold in Ohio by an Ohio dealer without permission from the state.

Section 6373-1, Ohio Act.

This is a direct burden upon interstate commerce and a discrimination against the securities of taxing subdivisions of sister states.

"Interstate commerce is not a matter that is left to the control of the states until further action by congress; nor is the freedom of that commerce from interference by the states confined to laws only; it extends to interference by any ultimate organ."

A direct interference by the state with interstate commerce cannot be justified by the police power."

Kansas City Southern Railway Co. vs. Kaw Valley Drainage District, 233 U. S. 75.

Mr. Justice Holmes in that case said:

"The decisions also show that a state cannot avoid the operation of this rule by simply invoking the convenient apologetics of the police power. It repeatedly has been said or implied that a direct interference with commerce among the states could not be justified in this way. The state can do nothing which

will directly burden or impede the interstate traffic of the company, or impair the usefulness of the facilities for such traffic."

THE STATE MAY NOT IMPOSE A LICENSE CHARGE ON ONE WHO SELLS ARTICLES WHICH HE IMPORTS.

"And as the right to bring goods from other states includes the right to sell them and to solicit sales therefor, as well as to deliver the property sold, the state can not tax the right to sell or deliver or to solicit sales, whether in the form of a license tax or otherwise. It is immaterial that the tax is without discrimination, as between domestic and foreign drummers, as interstate commerce can not be taxed at all."

(Judson on Interstate Commerce, Section 21.)

For the same reasons that it cannot be taxed a license fee may not be imposed.

CORPORATIONS ARE PERSONS WITHIN THE MEANING OF THE FOURTEENTH AMENDMENT, AND ARE THEREFORE ENTITLED TO DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAWS.

"Corporations, it is true, are not citizens within the meaning of the constitution, providing that citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states, though they are persons within the meaning of the fourteenth amendment and are therefore entitled to due process of law and the equal protection of the laws.

(Judson on Interstate Commerce, Section 16.)

THE AMENDMENT OF THE CONSTITUTION OF OHIO IS WITHOUT EFFECT IN THIS CASE.

The amendment of the constitution of Ohio relied upon by counsel for appellant is without effect in this case. It adds nothing of materiality to the authority originally reserved to the general assembly with respect to the charters of corporations. We need not concede that the reserved power to amend charters authorizes amendments which would "substantially impair the object of the grant or any rights vested under it." Whatever limitations may have been placed upon Dartmouth College vs., Woodward, 4 Wheaton, 518, it still serves to protect substantial rights in property, but if we should make the concession, it still remains that the act now under consideration does not purport or assume to exercise such reserved authority. While an act clearly expressing the legislative intent to exercise such reserved power as the legislature may have would be effective though not in the form of an amendment, such intent must appear. In this act there is no suggestion of such intention. It does not purport to distinguish in its purposes between corporations and natural persons, nor domestic and foreign corporations. It assumes to regulate dealings in securities by all dealers within its definition. It should not be said that the legislative power is exercised by pure accident and without any intention whatever. As was said by this court in the case of Chicago, Burlington & Quincy Railroad Company vs. Railroad Commission of Wisconsin, 237 U. S. 220, at page 234:

"We would be very averse to decide that without explicit declaration every general law of a state ap-

plicable to corporations was enacted as an amendment to their charters."

Certainly in the present case it does not appear either from its title or its provisions that the legislature intended to pass an act applicable to corporations. If further discussion of the question is desirable it may be found in the opinion of the court below.

AS TO THE APPELLEES, ROSE AND COULTRAP.

After all that has been said upon the subject of corporations it must not be forgotten that the appellee, Rose, is a natural person, a citizen of the state of Ohio, there engaged in his constitutionally guaranteed right of conducting transactions in the normal contracts of commerce including interstate commerce. The appellee, Coultrap, a natural person, and a citizen of Pennsylvania, is engaged in the exercise of the same rights within the state of Ohio, and that right is guaranteed to him by the provision of the fourteenth amendment "**that no state shall abridge the privileges and immunities of citizens of the United States, nor deny to any citizen within its jurisdiction the equal protection of the laws.**"

CONCLUSION.

The penitential provision of Section 6373-8 for a resort to the Court of Common Pleas by one whose application for a license has been refused, or whose license has been revoked, is unavailing as repentance without restitution. The power attempted to be exercised by the commissioner is forbidden by the fourteenth amendment, whose terms seem to have escaped the attention of the

legislature: "**No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.**" These are direct limitations upon the power of the state and **upon all the departments of its government**. The state has made a law, which, by its manifold provisions transgresses all of them. It is forbidden to enforce it. There is no provision for the exercise of judicial power upon issues joined. The repetition before the Court of Common Pleas of the arbitrary proceedings before the commissioner would afford no remedy to him whose property rights are invaded, however it might affect the public respect for the courts. Even if the rights were to be determined in the exercise of judicial power, due process of law would be required to its validity. Moreover, one resorting to the Common Pleas Court under this section would realize that his "last end is worse than his first" for the act provides that: "the burden shall rest upon the plaintiff to disprove the grounds assigned and specified in the official action complained of."

Can any one find in this act a suggestion of deference to the requirement of the due process of law of constitutional government? By what may the act be distinguished from the administrative process of despotism?

Respectfully submitted,

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The distinction so elaborately pressed in the brief of our adversaries as to differences among legislative, administrative and judicial discretion does not seem to be of any importance in the present controversy, for the interdiction of the Fourteenth Amendment is against the state and all of its departments and officials.

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Numerous decisions of this court are condensed in the following paragraph from Chicago, B. & Q. R. Co. vs. Chicago, 166 U. S., 226:

"It is not contended, as it could not be, that the Constitution of Illinois deprives the railroad company of any right secured by the Fourteenth Amendment. For the state constitution not only declares that no person shall be deprived of his property without due process of law, but that private property shall not be taken or damaged for public use without just compensation. But it must be observed that the prohibitions of the amendment refer to all the instrumentalities of the state, to its legislative, executive, and judicial authorities, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that amendment against deprivation by the state, 'violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state.' This must be so, or, as we have often said, the constitutional prohibition has no meaning, and 'the state has clothed one of its agents with power to annul or evade it.' Ex parte Virginia, 100 U. S., 339, 346, 347, (25: 676, 679); Neal v. Delaware, 103

U. S., 370, (26: 567); *Yick Wo v. Hopkins*, 118 U. S., 356, (30: 220); *Gibson vs. Mississippi*, 162 U. S., 579, (40: 1078). These principles were enforced in the recent case of *Scott v. McNeal*, 154 U. S., 34, (38: 896), in which it was held that the prohibitions of the 14th Amendment extended to 'all acts of the state, whether through its legislative, its executive, or its judicial authorities'; and, consequently, it was held that a judgment of the highest court of the state, by which a purchaser at an administration sale, under an order of a probate court, of land belonging to a living person who had not been notified of the proceedings, deprived him of his property without due process of law contrary to the 14th Amendment.'

The opinion in which there was dissent from the judgment in that case gives clear approval to this doctrine.

IN THE

Supreme Court of the United States

October Term 1916.

No. 438.

HARRY T. HALL, SUPERINTENDENT OF BANKS
AND BANKING OF THE STATE OF OHIO,
Appellant,

vs.

THE GEIGER-JONES COMPANY,

No. 439.

HARRY T. HALL, SUPERINTENDENT OF BANKS
AND BANKING OF THE STATE OF OHIO,
Appellant,

vs.

DON C. COULTRAP.

No. 440.

HARRY T. HALL, SUPERINTENDENT OF BANKS
AND BANKING OF THE STATE OF OHIO;
CYRUS LOCHER, PROSECUTING ATTORNEY
OF CUYAHOGA COUNTY, OHIO, AND WILLIAM
T. SMITH, SHERIFF OF CUYAHOGA COUNTY,
OHIO,

Appellants,

vs.

WILLIAM R. ROSE AND THE RICHARD AUTO
MANUFACTURING COMPANY.

**ANALYSIS OF THE OHIO BLUE SKY LAW AND
CASES REFERRED TO IN CONNECTION
WITH THE VARIOUS PROVISIONS CITED
BY FRANCIS R. MARVIN, OF COUNSEL FOR
APPELLEES.**

Analysis of the So-Called "Blue Sky" Law Found in Sections 6373-1 to 6373-24 G. C.

The act in question is entitled, "An act to regulate the sale of bonds, stocks and other securities and of real estate not located in Ohio and to prevent fraud in such sales." Its purpose to interfere with the free and unrestricted sale and exchange of such securities and the private right of contract with respect thereto is glaringly apparent from an examination of the first section thereof, which reads (6373-1):

"Except as otherwise provided in this act, no dealer shall, within this state, dispose or offer to dispose of any stock, stock certificates, bonds, debentures, collateral trust certificates or other similar instruments (all hereinafter termed 'securities') evidencing title to or interest in property, issued or executed by any private or quasi-public corporation, co-partnership or association (except corporations not for profit), or by any taxing subdivision of any other state, territory, province or foreign government, **without being first licensed so to do as hereinafter provided.**"

By the terms of Section 6373-2, a "dealer" is deemed to include any person or company (except national banks) disposing or offering to dispose of any such securities through agents or otherwise, and any company engaged in the marketing or flotation of its own securities, either directly or through agents or underwriters, or any stock promotion scheme whatsoever (certain exceptions).

By Section 6373-2, subdivision (f) it is provided that "the term 'company' shall include any corporation, co-

partnership or association, incorporated or unincorporated, and whenever and wherever organized.

The above sections taken together then mean simply this, that **no** person, corporation, partnership or association, (in other words, **no** person or combination of persons whatsoever in the state of Ohio) (certain exceptions) can deal in **any** securities (certain exceptions) without being authorized so to do by the "commissioner" and submitting to the restrictions, prohibitions, penalties and delays, provided by the act, and further, that after being licensed, such licensee (so-called) must, before disposing of **any** securities whatsoever, first secure from such commissioner a certificate under the terms of Section 16 of the act and submitting to further restrictions and delays.

In its very purpose, then, to restrict the free transfer, sale, exchange and transmission of such securities, the act itself violates Article I, Section 8 of the United States constitution in that **it imposes an unreasonable and direct burden upon interstate commerce.**

(a) Corporate stocks and bonds constitute articles of interstate commerce.

Alabama, etc., Transportation Co. vs. Doyle, 210 Fed. 173.

Compton vs. Allen, 216 Fed. 537.

Bracey vs. Darst, 218 Fed. 482.

Sales of such securities, as between the states and their transmission from one state to another, whether through the mails or the instrumentality of common carriers, constitute interstate commerce. Sales may be and are affected by telegraph, telephone, correspondence, traveling salesmen and the issuers or investment

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companies, directly or through their local or branch houses. The securities may be delivered by such salesmen or branch houses at the time sales are made or subscriptions taken, or by the issuers or investment companies by means of any of the known and usual agencies for transmitting such instruments from one state or another.

(b) The act in question is not a license, inspection or taxing law, and the business sought to be regulated and controlled thereby is not one affected by a public interest. On page 178 of the opinion in 210 Fed. 173, the court says:

"It is well to remember that this act is neither a tax law nor a mere license law. It does not purport to be the former; and while it carries some of the nomenclature and some of the features of the latter, its dominant characteristics and effect are prohibitory. We may therefore disregard the principles and decisions which have sustained, as constitutional, various state tax laws and various state laws which merely licensed the carrying on of some business or occupation."

Again on page 184 of the same case the court says:

"It is the proposed individual transaction which is the subject of scrutiny. The investment company receives no license in substance nor in form. If it fully complies with the law and the issue and sale of stocks and bonds are approved, and if the next year or the next month it wishes to make another issue which may be substantially similar, it is forbidden to do so until there is another submission and another tacit approval. To call such provisions the licensing of an occupation or business is a misnomer. Engaging in a business is not the thing regulated or permitted."

Again on page 184 the court says:

"As to dealers, there is more of the form of license. They are required to register and to pay a registration fee and are subject to some general provisions and regulations. For this reason we said above that some parts of the act used the nomenclature of a license law. However, if this is a license to the dealers, it avails them nothing. They cannot do one item of business until that item has passed scrutiny; hence it is clear that the dominant purpose is not to license and supervise individuals in the following of an occupation or business, but to regulate to the point of prohibition, the business itself."

The attorney general says that the state may lawfully prescribe such burden upon such parties under its police power to enact inspection laws for the purpose of preventing the imposition of fraudulent practices on its citizens. The power to enact the law must be determined from that which is sought thereby to be ordained or accomplished, and not from the title it bears.

The scope of such inspection laws is not without its limitation as applied to the nature of the person, article or thing designed by the law to be inspected, and the manner and method of the inspection to be employed.

In 107 U. S. 159, Mr. Justice Miller says:

"What is an inspection? Something which can be accomplished by looking at or weighing or measuring the thing to be inspected, or applying to it at once some crucial test. When testimony or evidence is to be taken and examined, it is not inspection in any sense whatever."

The court in the Iowa case, 216 Fed. 537, after quoting the above language of Mr. Justice Miller, goes on to say:

"Conceding, therefore, to the fullest extent, the reserve power of the state to provide for the inspection of all such articles and commodities as food-stuffs for man or beast, drugs, medicines, products, compounds, and the like, moving in interstate commerce where inspection thereof is not already provided by national laws, and when, as stated by Mr. Justice Miller, some crucial test is established and may be applied, such as weighing, measuring, analyzing, and the like, it is apparent no such standard or test is or can be established under the act in question, but the test to be applied thereunder must and does rest upon evidence taken, examined, and weighed. It must be held the subjects of interstate commerce therein sought to be regulated and controlled are not only burdened by the act, but are directly burdened thereby, and that such articles are not the subject of state inspection laws. As bearing on this question, see Alabama & N. O. Transp. Co. v. Doyle, *supra*; International Text-Book Co. v. Pigg; 217 U. S. 91, 30 Sup. Ct. 481, 54 L. Ed. 678, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103; Crutcher v. Kentucky, 141 U. S. 47, 11 Sup. Ct. 851, 35 L. Ed. 649; Butler Bros. Shoe Co. v. United States Rubber Co., 156 Fed. 1, 84 C. C. A. 167."

On the question as to whether the business of selling stocks and bonds is one affected with a public interest, we desire to call attention to the language on page 179 of the Michigan case (210 Fed.).

"It is enough, now, to remember that the prohibition in question has to do with transactions **predominantly private**. * * * This statute does not deal with common carriers, grain elevators, or other enterprises of that class, nor distinctly with corporations, nor at all with saloons, itinerant ped-

dlers, and the like. The issuing of commercial paper, stocks, or bonds by a private company to get money for its own business no one can suppose is a public or quasi public enterprise; the business of buying and selling stocks and bonds and other securities is no more 'affected by a public interest' than is the business of buying and selling groceries. When we thus recall that the prohibition applies to a private business, the question at once presents itself whether frauds and opportunities for fraud sufficiently characterize the business to justify its entire prohibition save under drastic restrictions. We cannot shut our eyes to the fact, which all men know, that, as compared with the total dealings in securities, covered and contingently prohibited by this act, those which may fairly be suspected to be of a fraudulent character are a very trifling proportion; and there is no reason to suppose that the percentage of fraud is any greater than in each of the ordinary business and professional occupations."

PROVISIONS OF THE ACT WHICH DO IMPOSE A DIRECT AN UNREASONABLE BURDEN UPON INTERSTATE COMMERCE.

It is provided in Section 6373-1:

"Except as otherwise provided in this act, no dealer shall within this state dispose or offer to dispose of any stock * * * without first being licensed so to do as hereinafter provided."

To start with, then, this requiring of a license as a condition precedent to the carrying on of the lawful business of dealing in articles of interstate commerce, is a direct burden on such commerce. This has been held by this court in the case of *The International Text Book Co. vs. Pigg*, 217 U. S., 91; *Buck Stove Co. vs. Vickers*, 226 U. S., 205.

Section 6373-3. Before such license shall be issued to any dealer coming within the provisions of the act, such person, firm or corporation desiring to engage in the perfectly **legitimate and lawful business** of selling such securities, must file an application setting forth the information required by Section 6373-3, and if it be a corporation organized **under the laws of another state** it shall, in addition, file a copy of its articles of incorporation, certified by the proper officer of such state, territory or government, and of its regulations and by-laws, and if it be an unincorporated association, a certificate of association or deed of settlement.

Section 6373-4. Notice of such application shall then be published in a daily newspaper. The investigation of the commissioner then begins, and this investigation shall be such "as he may deem necessary," and if he, the commissioner, is satisfied of the good repute in business of such applicant, he then shall, **in not less than one week nor twenty days** after receiving proof of publication, issue such license.

Section 6373-9. The law further requires that even **after a dealer has secured a license** in the manner provided therein, he or it must, before the sale of stock of **any company** is permitted, procure, or have the company whose securities he intends to sell procure, a certification of the "commissioner," authorizing **the sale of that particular security**.

Section 6373-14. And if the issue is for the organizing or promoting of any company or for the flotation of the securities of any company after organization, additional information shall be filed as required by Section 14.

Section 6373-16. If the commissioner finds that the applicant has complied with the law, is not fraudulently conducting its business, is not proposing to dispose of its securities on grossly unfair terms and is solvent, a certificate authorizing the disposal of such securities shall issue, but if the commissioner does not so find the certificate must be refused. It must be issued or denied within a **reasonable time** after the application for it is made, which time shall be within **thirty days** after the applicant, or certificate holder whose certificate has been revoked, has **fully complied with all the requirements of the act**, but as the **commissioner is the sole judge of what constitutes compliance**, and as the examination, especially of large concerns, would in some instances be prolonged and at times have to be conducted at distant points in this or another country, **the issue of a certificate may be delayed indefinitely and beyond the thirty-day limit.**

That such delays are an interference with interstate commerce and wholly beyond the authority of the police power, is, in our opinion, without question. During the period of **twenty days** after the application is made and data filed with the commissioner, there can be no sale of the securities (unless the commissioner sees fit under Section 6373-4). Under the last named section it is wholly discretionary with him whether he shall grant a temporary license, and the same may be arbitrarily withheld by him). After the license is issued there may be a further delay of thirty days or even longer, and any company, or person which issues and sells, or any dealer who sells during such period may be guilty of a felony. **This is the law without regard to the character**

of the securities. They may be of the highest quality in every respect. The emergency requiring immediate sale may be extreme; these considerations cut no figure; the law proclaims a twenty day—a thirty day—or a fifty day paralysis. If a company perfectly solvent but in need immediately of ready money, arranges a bond issue and has people ready to purchase the bonds, nothing can be done until a license is received, nor until a certificate is issued, and this may be a period of **fifty days**. In the meantime things must stop. When we observe a non-resident, owning stocks or bonds of the highest quality, and upon which no criticism has been or can be made, and who desires to sell them in Ohio to some one who there desires to buy, is totally forbidden so to do for a period of thirty days on penalty of a felony, and that there is no machinery of the law by which he can get permission or approval until the twenty day period, it is clear enough that the restraint is substantial and direct. Such a provision bears no **reasonable relation** to the public health or the public morals, or even to the "public welfare" in the broadest conceivable sense of the phrase.

Section 6373-6 and 7. And within five days after such license may have been issued, the commissioner may revoke the same upon "ascertaining" (the manner of which is not pointed out) that the licensee (a) is of bad repute, (b) has violated any provision of this act (c) has engaged or is about to engage, under favor of such license, in illegal business or any fraudulent transactions. And such dealer cannot be re-licensed for a period of **six months**.

The information required of a foreign corporation under the provisions of Section 6373-3, Section 6373-9, Section 6373-14, as a condition precedent to such corporation's right to transact a lawful business, has been held by this court in International Text Book Company vs. Pigg, 217 U. S., 91, and Buck Stove Company vs. Vickers, 226 U. S., 205, to impose a direct burden on interstate commerce, because it is not competent for a state legislature to prescribe, as a condition of the right of a foreign corporation to engage in legitimate interstate transactions, that it should prepare a statement as required, as to its stock, authorized and paid up, and its par and market value, as to its assets, liabilities, officers, trustees, directors, manager, and stockholders, with a showing of the stockholdings of each of the latter and the amount paid on his holdings, and the post-office address of all of such above named persons. This was likewise denounced in Crutcher vs. Kentucky, 141 U. S., 47.

Section 6373-3. "If the applicant be a corporation organized under the laws of **any other state**, etc., it shall file additional information."

Section 6373-9. "If the securities be of a taxing subdivision of **any other state province or foreign government** * * * (additional information is required).

Section 6373-10 (f). The information required in the preceding Section 9 need not be filed "where the disposal is made for a commission of less than one per centum of the par value thereof, by a licensee who is a member of a regularly organized and recognized stock exchange, and who has an established and lawfully conducted place of business in **this state**, regularly open for public patronage as such."

Section 6373-14. "This section shall not apply *** where the securities are those of a common carrier, or of a company organized under the laws of **this state**. *** And the whole or a part of the property, upon which such securities are predicated, is located within **this state**.

The above burdens which the act imposes on interstate commerce are so direct, positive and substantial as to lend peculiar force to the rule announced in the Pigg, Vickers and Crutcher cases, and to vitiate the entire act for the reason that its constitutionally offensive features are so distributed through its various parts as to be inseparable.

II.

THE LAW DEPRIVES OF PROPERTY WITHOUT DUE PROCESS.

The act must be further tested by its effect upon the citizen's **right to pursue a lawful calling**. That the act transcends the legislative exercise of the police power, and that the business sought to be regulated is not one affected with a public interest, has been discussed at length in this brief on pages and nothing further need be said at this time on that question.

Legitimate commercial transactions, such as the disposal of securities of the kind contemplated by the act, cannot be regulated by legislative enactment. The act in question seeks to regulate **private transactions**. But the person, natural or artificial, that sells securities based upon reasonable value, is entitled to the protection and same safeguards as the man who sells clothing, dry

goods, groceries, or hardware, or engages in other business that is not affected by a public interest. See Butcher's Union Co. vs. Crescent City Co., 111 U. S., 746 at 763.

It is said in Allgeyer vs. Louisiana, 156 U. S., 578 at 589, that the liberty mentioned in the fourteenth amendment embraces "the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

If an insurer or owner of or dealer in securities issued in good faith and based on value fairly commensurate with their face or selling value, is deprived of the right of disposal, he is deprived not only of his property, within the meaning of the constitution, by taking from him one of the incidents of ownership, but also of his liberty, as appears from Mr. Justice Matthews' saying in 118 U. S., 356 at 370, that:

"The very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

Section 6373-9. "Before such licensee shall dispose of such securities, he shall file with the commissioner * * * the approximate price at which the licensee pur- poses to dispose of such securities."

Section 6373-16. "The said commissioner shall have power to make such examination of the securities * * * **as he may deem advisable**, and if it shall appear that * * * the proposed disposal of such securities is not on **grossly unfair terms** * * * the commissioner shall issue his certificate to that effect, authorizing such disposal.

In other words, no stocks, bonds or other securities shall be sold within this state unless the commissioner thinks that **they are worth the price which is asked**. The act does not put it quite so baldly, but the language can mean nothing else. If after such a finding is made, the property is sold to a careful purchaser, who is in no way misled, but buys just what he wants and pays what he thinks it is worth, the seller may be imprisoned in the penitentiary; and it would be quite immaterial that the commissioner was wrong, and that the security sold was in fact worth the price. The element of fraud is wholly eliminated from this part of the statute, and all the dependent police power to protect the citizen against fraud must concurrently disappear. No definition of the police power which we have seen is broad enough to cover such prohibition, and we are aware of no consideration which even plausibly supports its validity.

It may be assumed that the commissioner is more experienced and wiser than two citizens who desire to buy and sell property, with which they are familiar, at the price they have agreed upon; it may be assumed that the commissioner can foresee the coming events which would bring profit or loss on a proposed investment; but it has never yet been supposed by any court or textwriter that it was within the police power of the

state to decide for its citizens the financial advisability of their investments, so long as the investors were not misled or deceived.

Section 6373-4; Section 6373-16. The delays occasioned by the above provisions are alike fatal to the due process clause of the constitution. Such a provision is an arbitrary and oppressive interference with the right of contract.

There is no provision in the statute for a hearing of any kind.

Every investigation and examination authorized is ex parte, without permission to the applicant, whether dealer or issuer, to pay one word in defense, even of his good repute or of the charge that he is engaging in illegal or fraudulent business.

By Section 6373-4 it is provided that if the commissioner be satisfied of the "good repute" in business of the applicant, he shall register such applicant. This state of mind of the commissioner may be the result of "such investigation as he may deem necessary" Section 6373-3, (e), and, of course, if he does not deem such investigation necessary, it is optional with him whether any such inquiry or investigation is made.

Section 6373-6. It is provided that such commissioner may revoke such license upon "ascertaining" that the licensee (a) is of "bad business repute;" (b) has violated any provision of this act; (c) has engaged or is about to engage, under favor of such license, in "illegal business" or "fraudulent transactions." The method of such ascertaining is not pointed out, and of all of the above things, the commissioner is to be the sole judge.

Section 6373-16. "The said commissioner shall have power to make such examination of the securities * * * **as he may deem advisable**, and if it shall appear that * * * the proposed disposal of such securities is not on **grossly unfair terms** * * * the commissioner shall issue his certificate to that effect, authorizing such disposal.

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By Section 6373-4 it is provided that if the commissioner **be satisfied** of the "good repute" in business of the applicant, he shall register such applicant. This state of mind of the commissioner may be the result of "**such investigation as he may deem necessary**" Section 6373-3, (c), and, of course, if he does not deem such investigation necessary, it is optional with him whether **any** such inquiry or investigation is made.

Section 6373-6. It is provided that such commissioner may revoke such license upon "ascertaining" that the licensee (a) is of "bad business repute;" (b) has violated any provision of this act; (c) has engaged or is about to engage, under favor of such license, in "illegal business" or "fraudulent transactions." The method of such ascertaining is not pointed out, and of all of the above things, the commissioner is to be the **sole judge**.

Before the dealer or issuer can dispose of one share of stock he must file the information provided for by Section 9 and in certain cases, also that provided for in Section 14. This must be done before the commissioner is required to make any examination of the securities proposed to be sold.

Section 6373-16. "Said commissioner shall have power to make such examination of the securities or of the property named in the next preceding sections **as he may deem advisable.**"

Whether he makes any such examination at all is therefore wholly optional with him.

Some of the other arbitrary powers conferred upon the commissioner are as follows:

Section 6373-4. The commissioner may arbitrarily delay passing upon an application for twenty days, and he may or may not grant or revoke temporary permission to transact business.

Section 6373-6. He **may** revoke or refuse to issue, at any time, the license of the licensee if he deems him of bad repute, and of these things he is to be the **sole judge**.

Section 6373-10. The commissioner can require the information provided for in Section 9 or not, just as he sees fit. So also can he approve or not approve the manual which contains certain information, and he is to be the **sole judge** as to whether such licensee has an established and lawfully conducted place of business, or whether the stock exchange to which he belongs is regularly organized.

Section 6373-14. The commissioner has power to determine whether an underwriter acts in good faith.

Section 6373-16. The commissioner **may** wait thirty days before issuing his certificate.

Of all of the above things, the commissioner is to be the **sole judge**.

The applicant whether a dealer or issuer, is not permitted to be heard as to the granting or revocation of a license, or the award of a certificate, on the important question of his own good repute, his alleged violations of the provisions of the statute, the legitimacy of his business, the honesty of his conduct, the fairness of the terms on which his disposals are made, or his own insolvency. No rules of procedure are prescribed in accordance with which the investigation shall be made, or is the commissioner required to establish any rule or regulations as to what shall constitute good repute, insolvency or fraudulent conduct. He may, at will, deal with each case as it arises, and vary his course to suit his pleasure. He is at liberty to hear, as he chooses, only evidence favorable to the investigated party. None of it need be safeguarded by an oath. The uncontrolled discretion, and even whim and caprice (if he gives them play) of the commissioner or of his assistant (subject to the commissioner's supervision) may not only halt, but injure and perhaps destroy a worthy business enterprise and cast a cloud on the name of the applicant or licensee, and when such applicant or licensee seeks redress in the courts he must assume the burden of disproving the findings made against him, however groundless they may be.

As was said in the course of the opinion in the Michigan case, with respect to such language as "good repute" and "unfair terms,"—"broader and vaguer lan-

guage could not be chosen. It subjects to the practically uncontrolled discretion of the commissioner every issue or general sale of stocks, bonds or securities hereinafter to be made."

It is true (Section 6373-8) that one whose license shall be revoked, or to whom a renewal of license may be denied, has a species of court procedure accorded him, but he is remitted to the Franklin county court and thus is, in effect, denied access to the federal court. That this is a clear violation of the federal constitution of the United States is shown in Butler Bros. Shoe Co. vs. U. S. Rubber Company, 156 Fed. Rep., 1.

In this court proceeding provided by Section 8, the **burden of proof** shall rest upon the plaintiff to disprove the grounds assigned and specified by the commissioner. Even if it did not contain this monstrous and unheard of provision, the procedure provided for results in fatal delay. The commissioner does not have to answer for one week after the return day; an application for advancement must then be filed before the case can be heard. During this period, no provision is made for the protection of the applicant. (Nor is there during the twenty day period pending the application, except the temporary license which the commissioner "may" grant or not as he sees fit.) Added to this the thirty day delay provided for by Section 6373-16 (during which time the commissioner may investigate the securities to be sold) and many of the most valuable businesses known to the commercial world may, by market changes or other reasons, be absolutely and irrevocably ruined.

Section 6373-24. "The superintendent of banks, as commissioner under this act, is hereby authorized to

appoint an assistant commissioner * * * subject to the supervision of such commissioner he may perform all the duties imposed upon, and have all the powers granted to such commissioner under the provisions of this act."

By the above it is at once seen that this political appointee of the commissioner, who is also a political appointee, is the important power which holds sway over the vast stock and bond business of the state, and is a part of the "process" which is to be used under the provisions of the act for affecting the rights of those to whom the act applies.

Certainly it cannot be said that due process of law permits the imposition of the foregoing burden, and foregoing conditions on the right to prosecute **private** business.

III.

THE ACT DENIES TO PERSONS WITHIN THE STATE OF OHIO THE EQUAL PROTECTION OF THE LAW.

The act in question, in its provisions of inclusion and exclusion, both as to the kinds of securities which may or may not be sold, and the persons who may sell the same, is **discriminatory** in the extreme, such discrimination being, in almost every case, arbitrary, unjust, without reasonable ground and without bearing any relation to the expressed object of the act, viz., the prevention of fraud in the sale of stocks, bonds, etc.

EXCEPTIONS.

By the terms of Sections 6373-1 and 6373-2, the following stocks, bonds and securities may be sold by **any one**, without regard to their value, without regard to the fraudulent nature of the transaction, without regard to the character of the "disposee" and without his complying with a single provision of the act.

Section 6373-1.

- (a) Stocks of a corporation not for profit.
- (b) Bonds of a taxing subdivision of **this state**.

This latter is clearly an unjust discrimination.

Section 6373-2.

"Providing that the same have not been judicially declared invalid, and where, at the time of the sale there is no default in the payment of any part of the interest or principle.

- (c) Mortgage bonds and notes (other than corporate) secured by bona fide mortgage on real estate.
- (d) Corporate bonds and notes where more than fifty per cent of the entire issue is included in a sale to one purchaser.

The residue of the bonds, whether worthless or of value, may be sold without the supervision which the law provides. Another corporation of similar or precisely the same character, having no single purchaser for a majority of its bonds, is subjected to the provisions of the law, although its securities may be of the highest financial character.

- (e) Securities of quasi public corporations, where the issuance has been authorized by the public service commission of **this state**.

- (f) Stocks and bonds of any national bank.
- (g) Stocks and bonds of any bank or organized under the laws of **this s.**
- (h) Stocks and bonds of any trust company organized under the laws of **this state.**
- (i) Stocks and bonds of any building and loan association organized under the laws of **this state.**

All of the above discriminations appear to us unjust, unreasonable and bear absolutely no relation to the expressed object of the act.

Any of the following persons, firms or corporations may sell **any stock or security** regardless of its value, without regard to the fraudulent nature of the transaction, without regard to the character or reputation of the donee, and without his complying with a single provision of the act.

Section 6373-2.

- (a) A national bank.
- (b) An owner, not the issuer, who disposes of his own property, for his own account, when such disposal is not made in the course of repeated and successive transactions of a similar character by such owner.

Such an owner is at liberty to dispose of his holdings for his own account regardless of the statute, providing he can do so without resorting to repeated and successive transactions of similar character; but if such transactions are expedient or necessary, he may not sell, unless, at inconvenience and financial cost and through delay and the commissioner's approving stamp of "good repute in business" he obtains a dealer's license so to do.

- (c) An owner, a **natural person** other than the underwriter who disposes of his own property for his own account.

By the above provision, such natural person, whether he be of good repute or not in business, may dispose of them for his own account, but the underwriter, although he may possess the same moral qualities and wealth, or out-rank him in both, may not dispose of his holdings except by compliance with the none too clear provisions of the act.

Although a natural **person** may dispose of his holdings as above indicated, a **partisanship or association** may not do so.

(d) One in a **trust capacity** created by any law of the United States or of this or any other state by judicicial power, lawfully disposing of any property embraced within such trust.

(e) A bank or trust company organized under the laws of **this state**, selling a security for a licensee other than the underwriter, at a commission of not more than two per cent, where such bank or trust company is not a regular dealer in securities.

(f) One not the issuer who disposes of securities to a licensee or to a company which, as a part of its regular business, deals in or holds such securities.

(g) A **pledgee** selling, in the ordinary course of business, a security pledged to him as security for debt, in good faith and not for the purpose of avoiding this act.

(h) The issuer organized under the laws of **this state** where the disposal is in good faith and not for the purpose of avoiding this act, is made for the sole account of the issuer, without **any commission** and at a total expense of not more than two per cent of the proceedings realized therefrom plus five hundred dollars, and where **no part of the issue to be disposed of is issued directly or indirectly in payment of patents, services, good will or for property not located in this state.**

Section 6373-9.

"Before such licensee shall dispose of any such securities within this state, he shall file with such commissioner in such form as shall be determined by him, the following information concerning said security. * * * If the securities be of a taxing subdivision of any other state, territory, province or foreign government, there shall be filed in addition thereto a statement of the licensee, setting forth the nature of the obligation of such securities, how payment of the same is secured, and that, to the best of his knowledge, there is any default in the payment of any part of the interest or principle of such securities and are nonadjudications, adversely affecting, or pending suits questioning the validity of the same."

Section 6373-10.

"The information required in the preceding section need not be filed unless required by the commissioner.

(a) If the case has been filed by any other licensee.

(b) If actual current sales of the securities, at prices quoted, shall have been, from time to time, for not less than six months next preceding such disposal, published in the regular market reports of the news columns of a daily newspaper of general circulation in this state."

The exemptions based on market reports of a daily newspaper, as above provided, would fail to embrace large numbers of meritorious issues of the different classes of securities, for it is well known that many securities are not listed on the market.

(c) "Where there is a disposal of securities, the price paid or the consideration rendered for which, in a single transaction, by one donee shall amount to five thousand dollars or more."

It will be seen that the above can have no application to an issuer if some donee is found who, in a single transaction, acquired securities of a given issue to the amount of five thousand dollars or more. There are many worthy concerns, each capitalized for a considerable sum, in which no one's investment reaches that amount.

The above provision has the effect of putting a premium upon fraud, for if the amount of the sale is big enough, no matter how fraudulent or how unfair the price, it is not subject to the terms of this act. What becomes then of the "protection" to the "rich" widow and orphans? Surely they are entitled to, and in most cases need, much more protection than the poor ones.

(d) "Where the securities disposed of are those of **manufacturing** or **transportation** companies, or of **common carriers** or other public utilities * * *"

(e) "Where the information required, other than the approximate selling price, is contained in any standard manual of information, approved by such commissioner."

The above section leaves with the commissioner the sole determination as to whether any information shall be filed or not, simply upon his approval or non-approval of such manual of information.

(f) "Where the disposal is made for a commission of less than one per centum of the par value thereof, by a licensee who is a member of a regularly organized and recognized stock exchange, and who has an established and lawfully conducted place of business in **this state**, regularly open for public patronage as such."

And of all of this the commissioner is to be the **sole judge.**

And it will be noticed that although one comes within all of the above exceptions, still he may not be excused from filing the information provided by Section 9, if "required" by the commissioner so to do.

Section 6373-14.

"For the purpose of organizing or promoting any company or assisting in the flotation of the securities of any company after organization, no issuer or underwriter of such securities, and no person or company for or on behalf of such issuer or underwriter, shall dispose or attempt to dispose of any such securities * * * without filing additional information provided for by Sections (a), (b), (c), (d) and (e).

This section shall not apply * * * where the sale is made by or on behalf of an underwriter, who, in good faith and not for the purpose of avoiding the provisions of this act, purchases the securities so afterward sold by him, and pays therefor in cash or its equivalent, before attempting to sell the same, not less than ninety per centum of the price that such securities are therefor sold by him; nor where the securities are those of a common carrier or of a company organized under the laws of **this state**, and engaged principally in the business of manufacturing, transportation, coal mining or quarrying * * * "

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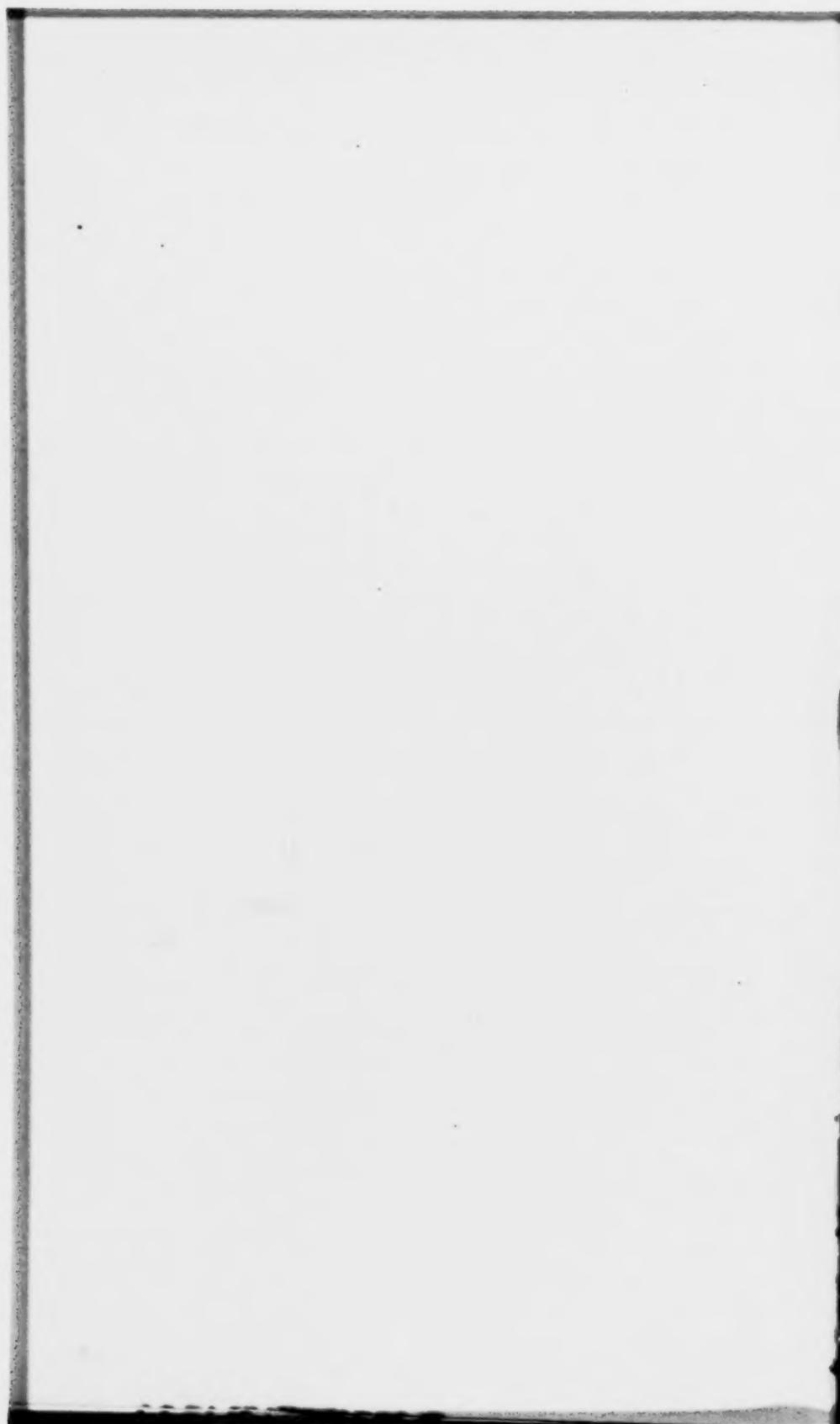
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M. B. and H. H. JOHNSON.

Of Counsel.



APR 8 1916

JAMES D. MAHER
Clerk

SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1915.

No. 941. 438

HARRY T. HALL, SUPERINTENDENT OF BANKS AND
BANKING OF THE STATE OF OHIO, APPELLANT,

vs.

THE GEIGER-JONES COMPANY.

No. 942. 439

HARRY T. HALL, SUPERINTENDENT OF BANKS AND
BANKING OF THE STATE OF OHIO, APPELLANT,

vs.

DON C. COULTRAP.

No. 943. 440

HARRY T. HALL, SUPERINTENDENT OF BANKS AND BANK-
ING OF THE STATE OF OHIO; CYRUS LOCHER, PROSECUT-
ING ATTORNEY OF CUYAHOGA COUNTY, OHIO, AND
WILLIAM T. SMITH, SHERIFF OF CUYAHOGA COUNTY,
OHIO, APPELLANTS,

vs.

WILLIAM R. ROSE AND THE RICHARD AUTO MANU-
FACTURING COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION.

MOTION TO ADVANCE.

EDWARD C. TURNER,
Solicitor for Appellants.



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MOTION TO ADVANCE.

Comes now the Attorney General of the State of Ohio, as
solicitor for appellants, and moves the court to advance the
above-entitled causes for hearing on a date convenient to the
court.

The above-entitled causes are appeals under section 266 of the Judicial Code from orders of the District Court of the United States for the Southern District of Ohio, Eastern Division, allowing interlocutory injunctions against appellants suspending and restraining the enforcement, operation, and execution of certain statutes of the State of Ohio, to wit, sections 6373-1 to 6373-24, both inclusive, of the General Code of Ohio, said sections having been duly enacted by the legislature of Ohio at its regular session in the year of 1913 as an act entitled "To regulate the sale of bonds, stocks, and other securities and real estate not located in Ohio and to prevent fraud in such sale," which said act is contained in volume 103 of the Laws of Ohio, pages 743 to 753, as amended 104 Ohio Laws, pages 110 to 119, inclusive, and as amended 106 Ohio Laws, pages 363 and 364, inclusive.

Said interlocutory injunctions each restrain the action of Harry T. Hall, the duly appointed, qualified, and acting Superintendent of Banks of Ohio, in the enforcement and execution of said statutes and said acts.

Said interlocutory injunction in cause No. 943 also restrains the action of Cyrus Locher, the duly elected, qualified and acting prosecuting attorney of Cuyahoga County, Ohio, and of William T. Smith, the duly elected, qualified, and acting sheriff of said Cuyahoga County, in the enforcement and execution of said statutes and said acts.

Said statutes and acts of Ohio seek to protect the citizens of Ohio from fraud in the sale in Ohio of certain kinds of stocks, bonds, and other securities not listed on some regular stock exchange, or whose values may not be ascertained from the market reports of a daily newspaper published in the State of Ohio or in some standard manual of information, as well as to protect the citizens of the State of Ohio against fraud in the sale in Ohio by other than the owner, *bona fide*, of real estate not located in Ohio.

Said court has declared said statutes and acts and all parts thereof null and void, not only as to citizens and cor-

porations of other States attempting to transact such business in Ohio, but as to citizens and corporations of Ohio as well.

Said legislation was passed in pursuance of an amendment to the Constitution of Ohio, which constitutional amendment was adopted by the people of Ohio in September, 1912, and became effective on January 1, 1913.

More than twenty other States of the United States have passed similar legislation involving identical principles of law and constitutional interpretation.

It is of the greatest importance to both the citizens and government of the State of Ohio, as well as to the citizens and government of many other States of the United States, that the power of the respective States to protect their citizens against fraud by the enforcement of such legislation be speedily determined. Pending such determination the functions of an important department of the government of the State of Ohio are being seriously interfered with by said interlocutory injunctions.

The Attorney General of Ohio as solicitor for appellants therefore urges that such special and peculiar circumstances exist in connection with the said several causes as to justify the court in advancing said causes and taking them up out of their regular order on the docket.

Respectfully submitted,

EDWARD C. TURNER,
Attorney General of Ohio,
Solicitor for Appellants.

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